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The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. 02–026–6]

Importation of Fruits and Vegetables; Correction

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule; correction.

SUMMARY: In a final rule published in the **Federal Register** on June 25, 2003, we amended the fruits and vegetables regulations. The final rule contained errors in the rule portion of the document. This document corrects those errors.

EFFECTIVE DATE: June 25, 2003.

FOR FURTHER INFORMATION CONTACT: Mr. Wayne Burnett, Senior Import Specialist, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737–1236; (301) 734–6799.

SUPPLEMENTARY INFORMATION: We published a final rule in the **Federal Register** on June 25, 2003 (68 FR 37904–37923, Docket No. 02–026–4) to amend the fruits and vegetables regulations (7 CFR 319.56 through 319.56–8, referred to below as the regulations). In the rule portion of that final rule, we inadvertently reversed the order of the words “latitude” and “longitude” in an amendment to § 319.56–2d, “Administrative instructions for cold treatments of certain imported fruits.” Rather than referring to “39° longitude and east of 104° latitude,” we should have referred to 39° latitude and east of 104° longitude.” This document corrects that error.

We are also correcting an error in the table in § 319.56–2t under the entry for basil from Honduras. The additional declaration referred to in that entry

should state that the “commodity is free from *Planococcus minor*” rather than the “fruit is free from *Planococcus minor*.”

In FR Doc. 03–15908, published on June 25, 2003 (68 FR 37904–37923, Docket No. 02–026–4), make the following corrections:

§ 319.56–2d [Corrected]

■ 1. On page 37917, in the first column, in § 319.56–2d, in paragraph (b)(1), correct “39° longitude and east of 104° latitude” to read “39° latitude and east of 104° longitude”.

§ 319.56–2t [Corrected]

■ 2. On page 37919, in § 319.56–2t, in the table, under the entry for basil from Honduras, correct “fruit is free from *Planococcus minor*” to read “commodity is free from *Planococcus minor*”.

Done in Washington, DC, this 5th day of November 2003.

Peter Fernandez,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 03–28293 Filed 11–10–03; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Part 381

[Docket No. 02–015N]

RIN 0583–AC97

Addition of Australia and New Zealand to the List of Foreign Countries Eligible To Import Poultry Products (Ratite Only) Into the United States

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Affirmation of direct final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing that it is confirming the addition of Australia and New Zealand to the list of countries eligible to import poultry products (ratite only) into the United States (U.S.).

Under this direct final rule, the meat of ratites slaughtered and processed in certified establishments in Australia and in New Zealand will be eligible for importation into the U.S. All ratite meat imported into the U.S. from Australia and New Zealand will be subject to

reinspection at U.S. ports-of-entry by FSIS inspectors.

ADDRESSES: Reference materials cited in the direct final rule and all comments received are available for public inspection in the FSIS Docket Room from 8:30 a.m. to 4:30 p.m., Monday through Friday in Room 102, Cotton Annex, 300 12th Street, SW., Washington, DC 20250–3700 and on the FSIS Web site at <http://www.fsis.usda.gov/OPPDE/rdad/FinalRules03.htm>.

FOR FURTHER INFORMATION CONTACT: Mr. Clark Danford, Acting Director, Import-Export Programs Staff, Office of International Affairs; (202) 720–6400.

SUPPLEMENTARY INFORMATION:

Background

On October 28, 2000, the President signed the FY 2001 Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act (the Appropriations Act), which provided that 180 days after the date of its enactment, U.S. establishments that slaughter or process ratites (such as ostriches, emus, and rheas) or squabs for distribution into commerce as human food would be subject to the requirements of the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*), rather than the voluntary poultry inspection program under section 203 of the Agriculture Marketing Act (AMA) (7 U.S.C. 1622). This provision of the Appropriations Act was effective on April 26, 2001. Prior to that time, imported ratite meat was regulated by the Food and Drug Administration (FDA).

On May 7, 2001, FSIS published an interim final rule (66 FR 22899) that amended the poultry products regulations to include ratites and squabs within the list of species that are “poultry” (9 CFR 381.1(b)) and thus subject to the mandatory inspection requirements of the PPIA.

This interim final rule also announced that within 18 months of April 26, 2001, imported ratite or squab products would have to originate in countries that were eligible to import poultry into the U.S. and would have to be processed in establishments certified by the government of the foreign country as eligible to export to the U.S.

During the 18 months, countries that were eligible to import meat into the U.S. were permitted to import ratites

into the U.S., provided that the animals were slaughtered in an establishment certified to export to the U.S. and provided the countries submit a request for establishing equivalency. The **Federal Register** document pointed out that Australia and New Zealand were both certified to import meat into the U.S. and had indicated that they planned to seek equivalency status to import ratites into the U.S. under the Federal poultry product inspection regulations.

In response to Australia's and New Zealand's request to establish equivalency to import ratite and ratite products into the U.S., FSIS conducted a review of the Australian and New Zealand ratite inspection systems to determine whether they are equivalent to the U.S. ratite inspection laws and regulations. The review concluded that both countries' requirements are equivalent to those mandated by the PPIA and its implementing regulations.

FSIS then conducted an on-site review of the Australian and New Zealand ratite inspection systems in operation. Both countries inspect ratites under the programs that FSIS has found equivalent to that of the U.S. for other species. The on-site review found that both countries were in fact implementing the slaughter and inspection procedures that FSIS found to be equivalent in its document analysis. The FSIS review team concluded that the implementation of ratite processing standards and procedures by both countries is equivalent to that by the U.S.

On June 23, 2003, FSIS issued a direct final rule (68 FR 37069) announcing that it planned to amend the Federal poultry products inspection regulations to add Australia and New Zealand to the list of countries eligible to import ratite meat products into the U.S. The rule made clear that these countries have consistently maintained their eligibility to certify meat slaughter and processing operations, and that they meet the equivalency standards.

The June 23, 2003, direct final rule provided a 30-day comment period, ending July 23, 2003. The direct final rule stated that the rule would be made effective "unless written adverse comments within the scope of this rulemaking or written notice of intent to submit adverse comments within the scope of this rulemaking are received on or before July 23, 2003."

FSIS received comments in response to the direct final rule, all from representatives of the U.S. ratite industry. After careful review and full consideration of these comments, FSIS has concluded that none of them raised

or discussed issues that were "within the scope of this rulemaking." None of the comments addressed whether the ratite inspection system in Australia and New Zealand is equivalent.

Most commenters believed that this direct final rule would "lift the import restrictions" on ratite products and voiced opposition to opening the American market to such products. These views reflected a misunderstanding of the rule's purpose and effect.

This change to the regulations does not "lift import restrictions" on ratite products from Australia and New Zealand or "open the market" to such products, since Australia and New Zealand have been able to import ratite products into the U.S. under the jurisdiction of FDA for years.

Under USDA regulations, foreign countries that import ratite meat into the U.S. are required to meet import requirements that substantially exceed those that were applied by FDA rules. For example, under USDA regulations ratite meat may be imported into the U.S. only from establishments in countries that have demonstrated to FSIS that they have a system of poultry inspection that is equivalent to the U.S. domestic program. In other words, foreign ratite meat must be as safe and wholesome as domestic ratite meat.

FSIS conducts annual audits of exporting countries' systems to verify the equivalence of their inspection program. Furthermore, under USDA jurisdiction, every lot of imported ratite meat must be presented to FSIS for reinspection at a U.S. port-of-entry. Products that are reinspected and found not to meet U.S. ratite meat standards would be rejected and refused entry into the U.S.

Other commenters focused on the importation of emu oil. The change to the regulation pertains only to ratite *meat*. Emu oil would be subject to FSIS jurisdiction only if it were imported for use as human food. FSIS is not aware of any direct food use for emu oils. Based on FSIS's understanding from the comments, emu oil is used in the U.S. for a variety of pharmaceutical purposes, but not for food. The pharmaceutical use of an animal-derived product will continue to be regulated by the FDA, not USDA.

Commenters also stated that American ratite farmers cannot compete with ratite products from Australia and New Zealand, because those countries sell their products at a lower cost than that of U.S. producers. However, as stated above and in the June 2003 direct final rule, Australia and New Zealand already import ratite meat into the U.S.

and have been doing so for some time. These foreign establishments import approximately 160,000 pounds of fresh or frozen whole, cut-up, or deboned ratite meat per year into the U.S. There is no reason to believe, nor have the commenters provided any reason to believe, that there will be a significant change in volume of trade as a result of this rule. Nor is this rule likely to have much of an effect on supply and prices. Therefore, this rule is not expected to have an impact on small domestic entities that produce these types of products. Even if the product quantities and varieties imported increase, there is no basis to make any conclusion other than that the volume increase will be minimal, and no significant impact will be realized.

After review and consideration of the comments received, FSIS has concluded that the comments received are not adverse comments within the scope of the rule. Thus, the Agency is affirming the direct final rule adding Australia and New Zealand to the list of countries eligible to import poultry products (ratite only) into the U.S.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to better ensure that minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it and make copies of this **Federal Register** publication available through the FSIS Constituent Update. FSIS provides a weekly Constituent Update, which is communicated via Listserv, a free e-mail subscription service. In addition, the update is available on-line through the FSIS Web page located at <http://www.fsis.usda.gov>. The update is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, recalls, and any other types of information that could affect or would be of interest to our constituents/stakeholders. The constituent Listserv consists of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals that have requested to be included. Through the Listserv and web page, FSIS is able to provide information to a much broader, more diverse audience.

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Done in Washington, DC, on November 5, 2003.

Dr. Garry L. McKee,
Administrator.

[FR Doc. 03-28273 Filed 11-10-03; 8:45 am]

BILLING CODE 3410-DM-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA-2003-16407; Airspace
Docket No. 03-ACE-75]

Modification of Class D Airspace; and Modification of Class E Airspace; Topeka, Philip Billard Municipal Airport, KS

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Direct final rule; request for
comments.

SUMMARY: Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures (SIAPs) have been developed to serve Philip Billard Municipal Airport, Topeka, KS. Also, the existing VHF Omni-directional Range (VOR)/Distance Measuring Equipment (DME) Runway (RWY) 22 SIAP serving Philip Billard Municipal Airport has been amended. An examination of controlled airspace for Topeka, Philip Billard Municipal Airport, KS revealed discrepancies in the legal descriptions for the Class D and Class E airspace areas.

The intended effect of this rule is to provide controlled airspace of appropriate dimensions to protect aircraft executing SIAPs to Philip Billard Municipal Airport. It also corrects discrepancies in the legal descriptions to Topeka, Philip Billard Municipal Airport, KS Class D and Class E airspace areas and brings the airspace areas and legal descriptions into compliance with FAA Orders.

DATES: This direct final rule is effective on 0901 UTC, February 19, 2004. Comments for inclusion in the Rules Docket must be received on or before December 12, 2003.

ADDRESSES: Send comments on this proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590-0001. You must identify the docket number FAA-2003-16407/ Airspace Docket No. 03-ACE-75, at the

beginning of your comments. You may also submit comments on the Internet at <http://dms.dot.gov>. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1-800-647-5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

FOR FURTHER INFORMATION CONTACT:

Kathy Randolph, Air Traffic Division, Airspace Branch, AC-520C, DOT Regional Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329-2525.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR 71 modifies the Class D airspace area and the Class E airspace area extending upward from 700 feet above the surface at Topeka, Philip Billard Municipal Airport, KS. RNAV (GPS) ORIGINAL SIAPs for RWYs 4, 13, 18, 22, 31 and 36 VOR/DME RWY 22, AMENDMENT 21, SIAP have been developed to serve Philip Billard Municipal Airport. Existing controlled airspace at Topeka, Philip Billard Municipal Airport, KS is adequate to contain aircraft executing the new RNAV (GPS) approach procedures. However, the Class E airspace areas extending upward from 700 feet above the Surface must be tailored to protect aircraft executing the amended VOR/DME RWY 22 SIAP. An examination of controlled airspace for Topeka, KS revealed discrepancies in the legal descriptions for Topeka, KS Class D and Class E airspace areas. This action corrects the discrepancies and brings the airspace areas and their legal descriptions into compliance with FAA Order 7400.2E, Procedures for Handling Airspace Matters. The areas will be depicted on appropriate aeronautical charts. Class D airspace are published in paragraph 5000 of FAA Order 7400.9L, dated September 2, 2003, and effective September 16, 2003, which is incorporated by reference in 14 CFR 71.1 Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of the same FAA Order. The Class D and Class E airspace designations listed in this document will be published subsequently in the Order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and, therefore, is issuing it as a direct final rule. Previous

actions of this nature have not been controversial and have not resulted in adverse comments or objections. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Interested parties are invited to participate in this rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA-2003-16407/Airspace Docket No. 03-ACE-75." The postcard will be date/time stamped and returned to the commenter.

Agency Findings

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

The FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments. For the reasons discussed in the preamble, I certify that this regulation (1) is not a "significant

regulatory action” under Executive Order 12866; (2) is not a “significant rule” under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ Accordingly, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 60103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9L, dated September 2, 2003, and effective September 16, 2003, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

ACE KS D Topeka, Philip Billard Municipal Airport, KS

Topeka, Philip Billard Municipal Airport, KS
(Lat. 39°04′07″ N., long. 95°37′21″ W.)
Topeka, Forbes Field, KS
(Lat. 38°57′03″ N., long. 95°39′49″ W.)

That airspace extending upward from the surface to and including 3,400 feet MSL within a 4-mile radius of Philip Billard Municipal Airport, excluding that airspace within the Topeka, Forbes Field, KS, Class D airspace area. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the airport/Facility Directory.

* * * * *

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ACE KS ES Topeka, Philip Billard Municipal Airport, KS

Topeka, Philip Billard Municipal Airport, KS
(Lat. 39°04′07″ N., long. 95°37′21″ W.)

Topeka VORTAC

(Lat. 39°08′14″ N., long. 95°32′57″ W.)

BILOY LOM

(Lat. 39°07′13″ N., long. 95°41′14″ W.)

Philip Billard Municipal Airport ILS

Localizer

(Lat. 39°03′47″ N., long. 95°36′42″ W.)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Topeka, Philip Billard Municipal Airport and within 3.4 miles each side of the 030° radial of the Topeka VORTAC extending from the 6.5-mile radius of the airport to 5.6 miles northeast of the VORTAC and within 4 miles southwest and 7 miles northeast of the Philip Billard Municipal Airport ILS localizer course extending from 15 miles southeast of the airport to 12 miles northwest of BILOY LOM.

* * * * *

Issued in Kansas City, MO on October 28, 2003.

Paul J. Sheridan

Acting Manager, Air Traffic Division, Central Region.

[FR Doc. 03–28258 Filed 11–10–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9088]

RIN–1545–BA57

Compensatory Stock Options Under Section 482

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to final regulations.

SUMMARY: This document contains corrections to final regulations that were published in the **Federal Register** on Tuesday, August 26, 2003 (68 FR 51171), that provide guidance regarding the application of the rules of section 482 governing qualified cost sharing arrangements.

EFFECTIVE DATE: This correction is effective August 26, 2003.

FOR FURTHER INFORMATION CONTACT: Douglas Gible (202) 435–5265 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations that are the subject of these corrections are under section 482.

Need for Correction

As published, the final regulations (TD 9088) contains an error that may prove to be misleading and is in need of clarification.

Correction of Publication

■ Accordingly, the publication of final regulations (TD 9088), which are the subject of FR Doc. 03–21355, is corrected as follows:

■ On page 51173, column 3, in the preamble, under the paragraph heading “Other Comments”, paragraph 2, line 5, the language “account for in the context of QCSAs is” is corrected to read “account in the context of QCSAs is”.

La Nita Van Dyke,

Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedures and Administration).

[FR Doc. 03–28348 Filed 11–10–03; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–03–042]

RIN 1625–AA09

Drawbridge Operation Regulation; Mississippi River, Iowa and Illinois

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Commander, Eighth Coast Guard District, is temporarily changing the regulation governing the Rock Island Railroad and Highway Drawbridge, across the Upper Mississippi River at Mile 482.9, at Rock Island, Illinois. The drawbridge need not open for river traffic and may remain in the closed-to-navigation position from 7:30 a.m., December 15, 2003, until 7:30 a.m., March 15, 2004. This temporary rule is issued to facilitate annual maintenance and repair on the bridge.

DATES: This temporary rule is effective from 7:30 a.m., December 15, 2003, until 7:30 a.m., March 15, 2004.

ADDRESSES: Documents referred to in this rule are available for inspection or copying at room 2.107f in the Robert A. Young Federal Building at Eighth Coast Guard District, Bridge Branch, 1222 Spruce Street, St. Louis, MO 63103–2832, between 8 a.m. and 4 p.m. Monday through Friday, except Federal holidays. The telephone number is (314) 539–3900, extension 2378. The Bridge Branch maintains the public docket for this rulemaking.

FOR FURTHER INFORMATION CONTACT: Mr. Roger K. Wiebusch, Bridge

Administrator, (314) 539-3900, extension 2378.

SUPPLEMENTARY INFORMATION:

Good Cause for Not Publishing an NPRM

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. This rule is being promulgated without an NPRM because the limited affect on vessel traffic makes notice and comment unnecessary. Maintenance on the bridge will not begin until after the closure of Lock 22 on the Mississippi River. After that time, only commercial vessels left in the pool above Lock 22 will be able to transit through the bridge. Both the bridge and lock closure recur at the same time each year, and local vessel operators plan for the closures in advance. Prompt publication of this rule is also necessary to protect the public from safety hazards associated with conducting maintenance on the bridge.

Background and Purpose

On September 17, 2003, the Department of the Army, Rock Island Arsenal, requested a temporary change to the operation of the Rock Island Railroad and Highway Drawbridge across the Upper Mississippi River, Mile 482.9 at Rock Island, Illinois to allow the drawbridge to remain in the closed to navigation from 7:30 a.m., December 15, 2003, until 7:30 a.m., March 15, 2004. Department of the Army, Rock Island Arsenal, requested that the drawbridge remain closed to navigation to allow the bridge owner time for preventive maintenance that is essential to the continued safe operation of the drawbridge.

The Rock Island Railroad and Highway Drawbridge has a vertical clearance of 23.8 feet above normal pool in the closed-to-navigation position. Navigation on the waterway consists primarily of commercial tows and recreational watercraft. Presently, the draw opens on signal for passage of river traffic. Winter freezing of the Upper Mississippi River coupled with the closure of Army Corps of Engineer's Lock No. 22 (Mile 301.2 UMR) until 7:30 a.m. March 15, 2004 will reduce any significant navigation demands for the drawspan opening. The Rock Island Railroad & Highway Drawbridge, Mile 482.9, Upper Mississippi River, is located upstream from Lock 22. Performing maintenance on the bridge during the winter when the number of vessels likely to be impacted is minimal is preferred to restricting vessel traffic

during the commercial navigation season.

Regulatory Evaluation

This rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security (DHS).

Because vessel traffic in the area of Rock Island, Illinois will be greatly reduced by winter icing of the Upper Mississippi River and the closure of Lock 22, it is expected that this rule will have minimal economic or budgetary effects on the local community.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601-612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. This temporary rule will have a negligible impact on vessel traffic. The primary users of the Upper Mississippi River in Rock Island, Illinois are commercial towboat operators. With the onset of winter conditions on the Upper Mississippi River coupled with the closure of Army Corps of Engineers' Lock No. 22 (Mile 301.2 UMR) until March 15, 2004, there will be few, if any, significant navigation demands for the drawspan opening.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), we offered to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process. Any individual that qualifies or, believes he or she qualifies as a small entity and requires assistance with the provisions of this rule, may contact Mr. Roger K. Wiebusch, Bridge Administrator, Eighth Coast Guard

District, Bridge Branch, at (314) 539-3900, extension 2378.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1-888-REG-FAIR (1-888-734-3247).

Collection of Information

This rule contains no new collection-of-information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that this rule does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulation actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector or \$100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health

Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We have considered the environmental impact of this rule and concluded that under figure 2-1, paragraph (32)(e), of Commandant Instruction M16475.1D, this rule is categorically excluded from further environmental documentation. Paragraph 32(e) excludes the promulgation of operating regulations or procedures for drawbridges from the environmental documentation requirements of the National Environmental Policy Act (NEPA). Since this regulation would alter the normal operating conditions of the drawbridge, it falls within this exclusion. A "Categorical Exclusion Determination" is in the docket for inspection or copying where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05-1(g); Department of Homeland Security Delegation No. 0170; 33 CFR 1.05-1(g); section 117.255 also issued under the authority of Pub. L. 102-587, 106 Stat. 5039.

■ 2. From 7:30 a.m., December 15, 2003, through 7:30 a.m., March 15, 2004, § 117.T395 is added to read as follows:

§ 117.T395 Upper Mississippi River; Rock Island Railroad and Highway Drawbridge, Mile 482.9, Upper Mississippi River.

From 7:30 a.m., December 15, 2003 through 7:30 a.m., March 15, 2004, the drawspan need not open for river traffic and may be maintained in the closed-to-navigation position.

Dated: October 30, 2003.

J.W. Stark,

Captain, U.S. Coast Guard, Acting Commander, Eighth Coast Guard District.

[FR Doc. 03-28319 Filed 11-10-03; 8:45 am]

BILLING CODE 4910-15-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD08-03-029]

RIN 1625-AA11

Regulated Navigation Area; Reporting Requirements for Barges Loaded With Certain Dangerous Cargoes, Inland Rivers, Eighth Coast Guard District; Correction

AGENCY: Coast Guard, DHS.

ACTION: Interim final rule; correction.

SUMMARY: On October 3, 2003, the Coast Guard published an interim final rule with a request for comments in the **Federal Register** that established a regulated navigation area (RNA) within all inland rivers of the Eighth Coast Guard District. This document contains corrections to that rule.

DATES: Effective November 1, 2003.

FOR FURTHER INFORMATION CONTACT: For information regarding this document, or if you have questions on viewing or submitting material to the docket, write or call Commander (CDR) Jerry Torok or Lieutenant (LT) Kevin Lynn, Project Managers for the Eighth Coast Guard District Commander, Hale Boggs Federal Bldg., 501 Magazine Street, New Orleans, LA 70130, telephone (504) 589-6271.

SUPPLEMENTARY INFORMATION: On October 3, 2003, the Coast Guard published an interim final rule entitled "Regulated Navigation Area; Reporting Requirements for Barges Loaded With Certain Dangerous Cargoes, Inland Rivers, Eighth Coast Guard District" in the **Federal Register** (68 FR 57358). As originally drafted, the information in paragraph (e) of § 165.830 was set out as a table. On publication in the **Federal Register**, the table was converted to a textual format. References elsewhere in the published document to that table must now be corrected to reference paragraph (e), rather than the table.

In the temporary interim rule FR Doc. 03-25165 published on October 3, 2003 (68 FR 57358), make the following corrections:

■ On page 57361, in the second column, on line 4, correct "table" to read "§".

§ 165.830 [Corrected]

■ On page 57364, in the second column, in paragraph (d)(1)(v), remove "in table 165.830(e)".

Dated: October 31, 2003.

R.F. Duncan,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 03-28328 Filed 11-10-03; 8:45 am]

BILLING CODE 4910-15-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD07-03-069]

RIN 1625-AA11

Regulated Navigation Area; Port Everglades Harbor, Fort Lauderdale, FL

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard has established a regulated navigation area in Port Everglades Harbor, Fort Lauderdale, Florida to promote national security and the safety and security of the harbor by enhancing law enforcement officer's opportunity to better protect high-risk vessels and facilities in Port Everglades Harbor. This rule establishes a slow speed zone in the harbor for vessels less than 150 meters in length.

DATES: This rule is effective November 12, 2003.

ADDRESSES: Comments and material received from the public, as well as

documents indicated in this preamble as being available in the docket, are part of docket [CGD07–03–069] and are available for inspection or copying at U.S. Coast Guard, Marine Safety Office, 100 MacArthur Causeway, Miami, Florida 33139 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: LT Douglas Tindall, Coast Guard Marine Safety Office Miami, Waterways Management at (305) 535–8701.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On April 25, 2003, the Coast Guard issued a temporary final rule entitled “Regulated Navigation Area; Port Everglades Harbor, Fort Lauderdale, FL” (68 FR 25498, May 13, 2003) creating a temporary regulated navigation area within Port Everglades Harbor. On June 6, 2003, we published a notice of proposed rulemaking (NPRM) entitled “Regulated Navigation Area; Port Everglades Harbor, Fort Lauderdale, FL” in the **Federal Register** (68 FR 33896).

We received four letters commenting on the proposed rule. No public hearing was requested, and none was held. Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. This rule is an important enforcement tool that assists law enforcement officials in responding to port security threats, protecting public safety, and ensuring the security of the Port and waterways. Therefore, delay of the effective date of this rule is contrary to public interest.

Background and Purpose

The terrorist attacks of September 2001 killed thousands of people and heightened the need for development of various security measures throughout the seaports of the United States. The President declared national emergencies following the September 11, 2001 terrorist attacks and has continued them, specifically: The Continuation of the National Emergency with Respect to Certain Terrorist Attacks (67 FR 58317, Sep. 13, 2002); and the Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism (67 FR 59447, Sep. 20, 2002). In Executive Order 13273, the President published a finding that, pursuant to law, including the Magnuson Act (50 U.S.C. 191 *et seq.*), the security of the United States is endangered because of the September 11, 2001 terrorist attacks on the United States (67 FR 56215, Aug. 21, 2002).

Following the September 2001 attacks, national security and intelligence officials warned that future terrorist attacks are likely.

The Captain of the Port (COTP) Miami has determined that there is an increased risk that subversive activity could be launched by vessels or persons in close proximity to Port Everglades because of the numerous high-capacity passenger vessels, vessels carrying hazardous cargo, critical infrastructure facilities including propane and petroleum processing facilities, and U.S. military vessels that use the port. This regulated navigation area will aid law enforcement officials in monitoring vessel traffic, because vessels not complying with the slow speed zone will quickly draw attention, giving law enforcement officials more time to assess the situation and take appropriate action to protect vessels within the port and port facilities.

The temporary final rule the Coast Guard issued April 25, 2003, entitled “Regulated Navigation Area; Port Everglades Harbor, Fort Lauderdale, Florida” (68 FR 25498) created a temporary regulated navigation area that encompassed a larger area of the port than this final rule encompasses. That temporary final rule expired at 12:01 a.m. on September 1, 2003. Prior to the creation of that temporary final rule, vessels were able to enter the harbor from sea at a high rate of speed and maintain that high rate of speed in the harbor until coming in close proximity of high capacity passenger vessels, vessels carrying hazardous cargo, critical infrastructure facilities and U.S. military vessels that are often moored within an existing security zone or naval vessel protection zone. Law enforcement officials did not have sufficient time to react to vessels that failed to slow their speed prior to reaching the limits of the existing security zone or naval vessel protection zone. This regulated navigation area is necessary to protect the public, port, law enforcement officials, and waterways of the United States from potential subversive acts.

Nothing in this final rule relieves vessels or operators from complying with all state and local laws in the regulated area, including manatee slow speed zones.

Discussion of Comments and Changes

We received four letters offering comments on the proposed rule. Generally, the comments were in opposition to the proposed rule.

Comments addressed the following areas:

- Overall effectiveness of the speed restrictions;
- Smaller vessels impeding larger vessels within the channel;
- Economic effects; and
- Rules of the road conflicts.

As a result of these comments, we made the following changes: In paragraph (a) the original eastern RNA boundaries in Bar Cut were moved west approximately 1300 feet removing the narrowest portion of Bar Cut from the zone, and the RNA westerly boundaries were moved east to coincide with existing state and local slow speed zones; and in paragraph (b) a reference to construing this rule as consistent with the Inland Navigation Rules’ safe speed requirement was added. Each comment is discussed in more detail in the following four paragraphs.

Overall effectiveness. Two comments questioned the overall effectiveness of the speed restrictions. They opined that any terrorist focused on causing destruction to the port will maneuver his vessel at the posted speed so as not to call attention to himself, approach his target and complete his goal. While this rule is not a panacea for port security, we disagree that it is ineffective. This rule will assist law enforcement officials in protecting the Port by enabling law enforcement officials to discriminate suspect vessels from legitimate marine traffic and will provide law enforcement officials with more time to investigate suspect vessels. The slow speed restriction makes vessels traveling at high speeds, vessels that rapidly increase speed, and vessels that are on headings toward critical infrastructure, high capacity passenger vessels, vessels carrying hazardous cargo, etc. more easily identifiable to law enforcement officials.

Smaller vessels impeding larger vessels. Two comments expressed concern about recreational boaters impeding commercial vessels due to their inability to move swiftly in the channel. The comments stated that since the implementation of the temporary rule, there has been a dramatic increase in the number of close quarters situations. The comment suggested that if this rule is implemented, in the interest of safe navigation, the Inner Bar Cut should be closed to all recreational vessels when commercial traffic is transiting the channel. The Coast Guard agrees with the potential for smaller vessels to impede larger commercial vessels. However, the Coast Guard disagrees that closing the channel to recreational vessels when commercial traffic is transiting is an appropriate way to prevent close quarters situations. The

Coast Guard believes that by moving the boundaries of the RNA, which reduces the area within the channel covered by the RNA, the potential for smaller vessels to impede larger commercial vessels is minimized.

Economic effects. One comment expressed a fear that this rule would be overly burdensome or nonsensical and it will cause recreational boaters to seek other hobbies. The comment expressed a fear that with less boaters operating, service providers, restaurants, fuel docks, marinas, repair facilities and assistance companies who depend on boating traffic will suffer negative economic impacts. The Coast Guard disagrees. Local and federal law enforcement officials on scene observed no decrease in vessel traffic from the period prior to the temporary rule going into effect and during the time the temporary rule was in effect.

Conflicts with the Rules of the Road. One comment expressed a concern that the rule will directly conflict with the Inland Rules of the Road. Rule 6 of the Inland Navigation Rules contained in the Inland Navigational Rules Act of 1980 (33 U.S.C. 2001 et. seq.) requires every vessel to proceed at a safe speed at all times so as to avoid collision and to stop within an appropriate distance given prevailing circumstances and conditions. (33 U.S.C. 2006, and see 33 CFR 89.23). The comment states that the area of the channel to which the proposed slow speed zone applies is the very area in which large commercial traffic is either accelerating to overcome the effects of cross wind and current or reducing speed prior to entering the confines of the port. The Coast Guard agrees that larger vessels may have to adjust their acceleration to overcome the effects of cross wind and current. As a result, the Coast Guard has moved the boundaries of the RNA, effectively reducing the area within the channel covered by the RNA, giving large vessels more area to slow down and speed up, to overcome the wind and current affects. Additionally, the Coast Guard is not subjecting vessels 150 meters or greater to the RNA's slow speed requirement. Finally, reducing the size of the RNA within the channel has removed the narrowest portion of the Inner Bar Cut from the RNA thus further minimizing the potential for smaller vessels to impede larger vessels operating within the channel.

Regulatory Evaluation

This rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs

and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security (DHS). The Coast Guard expects the economic impact of this rule to be so minimal that a full regulatory evaluation under the regulatory policies and procedures of DHS is unnecessary. The regulated navigation area is narrowly tailored to protect the public, ports and waterways of the United States. Vessels may transit through the regulated navigation area but must proceed at a slow speed.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" includes small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. The regulated navigation area is narrowly tailored to protect the public, port and waterways of the United States in Port Everglades, Florida. Vessels may transit through the regulated navigation area but must proceed at a slow speed.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls for no new collection of information under the Paperwork

Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 or more in any one year. Although this rule will not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order, because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We have analyzed this rule under Commandant Instruction M16475.ID, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. A final "Environmental Analysis Check List" and a final "Categorical Exclusion Determination" are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 106.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.765 to read as follows:

§ 165.765 Regulated Navigation Area; Port Everglades Harbor, Fort Lauderdale, Florida.

(a) *Location.* The following area in Port Everglades harbor is a regulated navigation area: all waters of Port Everglades harbor, from shore to shore, encompassed by a line commencing at the south mid-point tip of Harbor

Heights approximately 26°05.687' N, 080°06.684' W; thence south across Bar Cut to a point north of the Nova University Marina approximately 26°05.552' N, 080°06.682' W, thence southwesterly to a point near the center of Lake Mabel approximately 26°05.482' N, 080°06.793' W, thence northwesterly to a point near the Quick Flashing Red #12 approximately 26°05.666' N, 080°06.947' W, thence east to south mid-point tip of Harbor Heights (starting point) approximately 26°05.687' N, 080°06.684' W.

(b) *Regulations.* Vessels less than 150 meters entering and transiting through the regulated navigation area shall proceed at a slow speed. Nothing in this section alleviates vessels or operators from complying with all state and local laws in the area including manatee slow speed zones. Nor should anything in this section be construed as conflicting with the requirement to operate at safe speed under the Inland Navigation Rules, 33 U.S.C. 2001 *et seq.*

(c) *Definition.* As used in this section, *slow speed* means the speed at which a vessel proceeds when it is fully off plane, completely settled in the water and not creating excessive wake. Due to the different speeds at which vessels of different sizes and configurations may travel while in compliance with this definition, no specific speed is assigned to slow speed. A vessel is not proceeding at slow speed if it is:

- (1) On a plane;
- (2) In the process of coming up on or coming off of plane; or
- (3) Creating an excessive wake.

Dated: October 31, 2003.

H.E. Johnson, Jr.,

Rear Admiral, U.S. Coast Guard, Commander, Seventh Coast Guard District.

[FR Doc. 03–28330 Filed 11–10–03; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region 2 Docket No. NJ56–250c, FRL–7582–8]

Approval and Promulgation of Implementation Plans; Reasonably Available Control Technology for Oxides of Nitrogen for Specific Sources in the State of New Jersey

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is approving revisions to the New Jersey State

Implementation Plan (SIP) for ozone. These revisions consist of source-specific reasonably available control technology (RACT) determinations for controlling oxides of nitrogen (NO_x) emissions from seven facilities in New Jersey.

The EPA is also announcing that, for an eighth facility, New Jersey has revised a NO_x RACT permit emission limit that EPA previously approved and EPA is incorporating the revised stricter limit into the State's SIP.

This final rule approves the source-specific RACT determinations that were made by New Jersey in accordance with provisions of its regulation. The intended effect of this rulemaking is to approve source-specific emission limitations required by the Clean Air Act.

EFFECTIVE DATE: This rule will be effective December 12, 2003.

ADDRESSES: A copy of the New Jersey submittals are available at the following addresses for inspection during normal business hours:

Environmental Protection Agency, Region II Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866

New Jersey Department of Environmental Protection, Office of Air Quality Management, Bureau of Air Pollution Control, 401 East State Street, CN027, Trenton, New Jersey 08625

Environmental Protection Agency, Air and Radiation Docket and Information Center, Air Docket (6102T), 1301 Constitution Avenue, NW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT:

Anthony (Ted) Gardella, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–3892 or at Gardella.Anthony@epa.gov.

SUPPLEMENTARY INFORMATION: The following table of contents describes the format for the Supplementary Information section:

- I. What Action Is EPA Taking Today?
- II. What Comments Did EPA Receive in Response to Its Proposal?
 - A. Background information
 - B. Comments received and EPA's response
- III. What Is EPA's Conclusion?
- IV. Statutory and Executive Order Reviews

I. What Action Is EPA Taking Today?

EPA is approving revisions to New Jersey's ozone SIP submitted on January 21, 1998, June 12, 1998 and April 26, 1999. Seven specific sources are addressed in these SIP revisions. New Jersey revised and submitted these revisions in response to a Clean Air Act (CAA) requirement that states require

Reasonably Available Control Technology (RACT) at all major stationary sources of NO_x. The seven sources addressed are: American Ref-Fuel Company/Essex County Resource Recovery Facility; Co-Steel Corporation of Sayreville (formerly New Jersey Steel Corporation); Co-Steel Raritan Corporation; Homasote Company; Milford Power Limited Partnership; University of Medicine and Dentistry of Newark, and Roche Vitamins, Inc.

Additionally, on February 21, 2001, in a letter to EPA, New Jersey indicated that with regard to the Township of Wayne, in accordance with a previously submitted and approved SIP revision the State had changed the permitted NO_x limit to a more stringent limit. The previously approved SIP revision for this source indicated that the emission limits may be revised to reflect results from required stack testing. The permit required tests had been completed and New Jersey established a new, more stringent emission limit based upon the results of these tests and the new limit is also being incorporated into the SIP.

The specific NO_x emission limitations that EPA is approving in today's rulemaking and the full evaluation can be found in actions (68 FR 47532 and 68 FR 47477) published in the **Federal Register** on August 11, 2003.

II. What Comments Did EPA Receive in Response to Its Proposal?

A. Background Information

On August 11, 2003, EPA announced, in proposed and direct final rules published in the **Federal Register** (68 FR 47532 and 68 FR 47477, respectively), approval of New Jersey's NO_x RACT determinations for the same eight sources which are subject to today's final rulemaking. On August 11, 2003, EPA received an adverse comment on the direct final rule. EPA had indicated in its August 11, 2003 direct final rule that if EPA received adverse comments, it would withdraw the direct final rule. Consequently, EPA informed the public, in a withdrawal notice published in the **Federal Register** (68 FR 54163) on September 16, 2003, that EPA received an adverse comment and that the direct final rule did not take effect. EPA did not receive any other comments. EPA is addressing the adverse comment in today's final rule based upon the proposed action published on August 11, 2003.

B. Comments Received and EPA's Response

EPA received one adverse comment on its August 11, 2003 direct final rule to approve New Jersey's NO_x RACT

determinations for eight facilities located throughout the State from a concerned citizen. That comment and EPA's response follows.

Comments: A concerned citizen commented that "the standards for New Jersey should be set higher and require fewer tons per year emissions" and the citizen "did not feel these standards are high enough." The comments did not address any specific source or any specific NO_x emission limitation. In addition, no supporting information or justification was provided.

Response: The 1990 CAA requires states, in which areas are designated as nonattainment for the one-hour ozone standard and are classified as moderate or higher, to submit SIP provisions, for EPA approval, which establish RACT for major stationary sources of NO_x. EPA has defined RACT as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility (44 FR 53762, September 17, 1979).

In this regard, New Jersey determined that each of the eight sources were major stationary sources of NO_x and therefore subject to the CAA requirement to implement RACT. As discussed in the August 11, 2003 direct final rule, New Jersey submitted SIP revisions, for EPA approval, that established RACT, including NO_x emission limitations for each of the eight sources subject to the citizen's comment. It should be noted that EPA requires some new sources to be subject to more stringent requirements than the RACT requirements for existing sources, such as Best Available Control Technology (BACT) or Lowest Achievable Emission Rate (LAER). One of the eight sources addressed in the SIP submission is subject to BACT requirements, but the remaining seven sources are not subject to these more stringent requirements. New Jersey submitted its RACT determinations, for EPA approval, for the eight sources, to fulfill the CAA requirements for RACT and not to meet any other more stringent requirement.

EPA evaluated each RACT determination and documented its findings in "Technical Support Document—NO_x RACT Source Specific SIP Revisions—State of New Jersey" dated May 23, 2003. The August 11, 2003 direct final rule announced the availability of this technical support document to the public. However, EPA did not receive any requests for a copy. In the Technical Support Document for this rule, EPA indicates that New Jersey's submittals are consistent with

relevant EPA guidance and the requirements of the State's RACT regulation (Subchapter 19) and provide sufficient justification to support the established NO_x requirements. For the reasons provided in this section and in the Technical Support Document, EPA is approving the NO_x emission limitations for the eight sources subject to today's rulemaking as consistent with the RACT requirements of the CAA.

III. What Is EPA's Conclusion?

The EPA is approving the source-specific SIP revisions described above as RACT for the control of NO_x emissions from the seven sources identified in the three source-specific SIP revisions and for an eighth source, is approving the stricter limit revised by the State in accordance with a SIP revision which EPA previously approved. EPA is approving the State's RACT determinations because New Jersey established and imposed these RACT requirements in accordance with the criteria set forth in the SIP-approved RACT regulation applicable to these sources and because they conform with CAA requirements and EPA guidance. New Jersey has also established recordkeeping and testing requirements for these sources sufficient to determine compliance with the applicable RACT determinations.

IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4).

This rule also does not have tribal implications because it will not have a

substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules: (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or

practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding this action under section 801 because this is a rule of particular applicability.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 12, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: October 22, 2003.

Jane M. Kenny,

Regional Administrator, Region 2.

■ Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart FF—New Jersey

■ 2. Section 52.1570 is amended by adding new paragraph (c)(73) to read as follows:

§ 52.1570 Identification of plan.

* * * * *

(c) * * *

(73) Revisions to the State Implementation Plan submitted by the New Jersey Department of Environmental Protection on January 21, 1998, June 12, 1998 and April 26, 1999; and a letter which notified EPA of a revised permit limit submitted by the New Jersey Department of Environmental Protection on February 21, 2001.

(i) Incorporation by reference:

(A) Conditions of Approval Documents (COAD) or modified prevention of significant deterioration (PSD) permit: The following facilities have been issued COADs or modified PSD permit by New Jersey:

(1) American Ref-Fuel Company/Essex County Resource Recovery Facility, Newark, Essex County, NJ PSD permit modification dated July 29, 1997. Incorporation by reference includes only the NO_x emission limits in section A.6 of the July 29, 1997 PSD permit.

(2) Co-Steel Corporation's (formerly New Jersey Steel Corporation) electric arc furnace/melt shop and billet rehear furnace, Sayreville, Middlesex County, NJ COAD approval dated September 3, 1997.

(3) Co-Steel Raritan Corporation's electric arc furnace/ladle metallurgy system and billet rehear furnace, Perth Amboy, Middlesex County, NJ COAD approval dated June 22, 1998.

(4) Homasote Company's natural gas dryer (wet fibreboard mat dryer), West Trenton, Mercer County, NJ COAD approval dated October 19, 1998.

(5) Milford Power Limited Partnership's combined cycle cogeneration facility, Milford, Hunterdon County, NJ COAD approval dated August 21, 1997.

(6) University of Medicine and Dentistry of New Jersey's cogeneration units and Cleaver Brooks non-utility boilers, Newark, Essex County, NJ COAD dated June 26, 1997.

(7) Roche Vitamins Inc's cogeneration facility and Boiler No. 1, Belvidere, Warren County, NJ COAD dated June 10, 1998. The cogeneration facility consists of one reciprocal engine (21.5 MW) and one heat recovery steam generator (HRSG) equipped with a duct burner (Boiler No. 6).

(8) Township of Wayne, Mountain View Water Pollution Control Facility's sewage sludge incinerators, Passaic County, NJ permit revision dated December 21, 2000.

(ii) Additional information—Documentation and information to support NO_x RACT facility-specific emission limits, alternative emission limits, or repowering plan in three SIP revisions addressed to Regional Administrator Jeanne M. Fox from New Jersey Commissioner Robert C. Shinn, Jr. and one letter addressed to Acting Regional Administrator William J. Muszynski from Dr. Iclal Atay, Chief Bureau of Air Quality Engineering dated:

(A) January 21, 1998 SIP revision for two sources,

(B) June 12, 1998 SIP revision for one source,

(C) April 26, 1999 SIP revision for four sources,

(D) February 21, 2001 for a revised permit limit for one source.

[FR Doc. 03-28212 Filed 11-10-03; 8:45 am]

BILLING CODE 6560-50-U

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[IB Docket Nos. 02–34 and 00–248, FCC 03–154]

Satellite Licensing Procedures

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopts revisions to a new filing form for satellite license applications, entitled “Schedule S,” and a streamlined filing form for routine earth station license applications, entitled “Form 312 EZ.” The Commission also clarifies several rules related to the Commission’s information requirements for satellite and earth station licenses. These actions are necessary to facilitate compliance with the information requirements applicable to satellite and earth station license applicants.

DATES: The rule revisions contain information requirements that have not been approved by OMB. The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date of these rules.

FOR FURTHER INFORMATION CONTACT: Steven Spaeth, Attorney Advisor, Satellite Division, International Bureau, telephone (202) 418–1539 or via the Internet at steven.spaeth@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s Third Report and Order, IB Docket Nos. 02–34 and 00–248, FCC 03–154, adopted June 26, 2003, and released July 8, 2003. The complete text of this Third Report and Order is available for inspection and copying during normal business hours in the FCC Reference Center (Room), 445 12th Street, SW., Washington, DC 20545, and also may be purchased from the Commission’s copy contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (202) 863–2893, facsimile (202) 863–2898 or via email qualexint@lol.com. It is also available on the Commission’s Web site at <http://www.fcc.gov>

Paperwork Reduction Act Analysis

The actions taken in the Third Report and Order have been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, and found to impose new or modified reporting requirements or burdens on the public. Implementation of these new

or modified reporting and recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the PRA, and will go into effect upon announcement in the **Federal Register** of OMB approval.

Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),¹ Initial Regulatory Flexibility Analyses (IRFAs) were incorporated in the *Space Station Reform NPRM* in IB Docket No. 02–34,² and the *Part 25 Earth Station Streamlining NPRM* in IB Docket No. 00–248.³ The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.⁴

Need for, and Objectives of, the Report and Order: The objective of the rules proposed in the *Space Station Reform NPRM* and First R&O is to enable the Commission to process applications for satellite licenses more quickly than it can under its current rules. These rule revisions are needed because delays in the current satellite licensing process may impose economic costs on society, and because recent changes in the International Telecommunication Union procedures require us to issue satellite licenses more quickly in order to meet U.S. international treaty obligations. In addition, the current satellite licensing process is not well suited to some satellite systems employing current technology. Finally, revision of the satellite licensing process will facilitate the Commission’s efforts to meet its spectrum management responsibilities. By establishing a standardized form for space station applications, the Commission will be able to review and act on those applications more quickly than is now possible.

The objective of the *Part 25 Earth Station Streamlining NPRM* is to repeal or modify any rules in Part 25 that are no longer necessary in the public

interest, as required by section 11 of the Communications Act of 1934, as amended. Section 11 was added to the Communications Act by the Telecommunications Act of 1996, which requires the Commission in every even-numbered year beginning in 1998 to review all regulations that apply to the operations or activities of any provider of telecommunications service and to determine whether any such regulation is no longer necessary in the public interest due to meaningful economic competition. By adopting a streamlined form for routine earth station license applications, we modify some earth station information requirements that are no longer necessary in the public interest.

Summary of Significant Issues Raised by Public Comments In Response to the IRFAs: No comments were submitted directly in response to the IRFAs.

Description and Estimate of the Number of Small Entities To Which Rules Will Apply: The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted.⁵ The RFA generally defines the term “small entity” “as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁶ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁷ A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁸ A small organization is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”⁹ Nationwide, as of 1992, there were approximately 275,801 small organizations.¹⁰ “Small governmental jurisdiction” generally

⁵ 5 U.S.C. 603(b)(3).

⁶ Id. 601(6).

⁷ 5 U.S.C. 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.” 5 U.S.C. 601(3).

⁸ Small Business Act, 15 U.S.C. 632 (1996).

⁹ 5 U.S.C. 601(4).

¹⁰ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

¹ See 5 U.S.C. 603. The RFA, see 5 U.S.C. 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. 104–121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² Amendment of the Commission’s Space Station Licensing Rules and Policies, *Notice of Proposed Rulemaking*, IB Docket No. 02–34, 67 FR 12485 (Mar. 19, 2002).

³ 2000 Biennial Regulatory Review—Streamlining and Other Revisions of Part 25 of the Commission’s Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Earth Stations and Space Stations, *Notice of Proposed Rulemaking*, IB Docket No. 00–248, 66 FR 1283 (Jan. 8, 2000).

⁴ See 5 U.S.C. 604.

means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."¹¹ As of 1992, there were approximately 85,006 such jurisdictions in the United States.¹² This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.¹³ The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities. Below, we further describe and estimate the number of small entity licensees that may be affected by the proposed rules, if adopted.

The rules proposed in the *Space Station Reform NPRM* and *First R&O* would affect satellite operators, if adopted. The Commission has not developed a definition of small entities applicable to satellite operators. Therefore, the applicable definition of small entity is generally the definition under the SBA rules applicable to Satellite Telecommunications.¹⁴ This definition provides that a small entity is expressed as one with \$11.0 million or less in annual receipts.¹⁵ 1997 Census Bureau data indicate that, for 1997, 273 satellite communication firms had annual receipts of under \$10 million. In addition, 24 firms had receipts for that year of \$10 million to \$24,999,990.¹⁶

In addition, Commission records reveal that there are approximately 240 space station operators licensed by this Commission. We do not request or collect annual revenue information, and thus are unable to estimate the number of licensees that would constitute a small business under the SBA definition. Small businesses may not have the financial ability to become space station licensees because of the high implementation costs associated with satellite systems and services.

Below, we further describe and estimate the number of small entity

licensees that may be affected by the rules proposed in the *Part 25 Earth Station Streamlining NPRM*:

1. *Cable Services.* The Commission has developed its own small business size standard for a small cable operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.¹⁷ Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable companies at the end of 1995.¹⁸ Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small cable companies that may be affected by the proposed rules.

The Communications Act of 1934, as amended, also contains a size standard for a "small cable operator," which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."¹⁹ The Commission has determined that there are 67,700,000 subscribers in the United States.²⁰ Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.²¹ Based on available data, we estimate that the number of cable operators serving 677,000 subscribers or less totals approximately 1,450.²² We do not request or collect information on whether cable operators are affiliated with entities whose gross annual revenues exceed \$250,000,000,²³ and

therefore are unable to estimate accurately the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

2. *Satellite Telecommunications Services.* The rules adopted in this Third Report and Order affect providers of satellite telecommunications services. Satellite telecommunications service providers include satellite operators and earth station operators. The Commission has not developed a definition of small entities applicable to satellite operators. Therefore, the applicable definition of small entity is generally the definition under the SBA rules applicable to Satellite Telecommunications.²⁴ This definition provides that a small entity is expressed as one with \$12.5 million or less in annual receipts.²⁵ 1997 Census Bureau data indicate that, for 1997, 273 satellite communication firms had annual receipts of under \$10 million. In addition, 24 firms had receipts for that year of \$10 million to \$24,999,990.²⁶

3. *Auxiliary, Special Broadcast and other program distribution services.* This service involves a variety of transmitters, generally used to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the station). The Commission has not developed a definition of small entities applicable to broadcast auxiliary licensees. Therefore, the applicable definition of small entity is the definition under the Small Business Administration (SBA) rules applicable to radio broadcasting stations (NAICS 513112) and television broadcasting stations (NAICS 513120). These definitions provide that a small entity is one with either \$6.0 million or less in annual receipts for a radio broadcasting station or \$12.0 million in annual receipts for a TV station. See 13 CFR 121.201. As of September 1999, there were 3,237 FM translators and boosters,

franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission's rules. See 47 CFR 76.990(b).

²⁴ "This industry comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications." Small Business Administration, 1997 NAICS Definitions, NAICS 513340.

²⁵ 13 CFR 120.121, NAICS code 513340.

²⁶ U.S. Census Bureau, 1997 Economic Census, Subject Service: Information, "Establishment and Firm Size," Table 4, NAICS 513340 (Issued Oct. 2000).

¹¹ 5 U.S.C. 601(5).

¹² U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

¹³ *Id.*

¹⁴ "This industry comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications." Small Business Administration, 1997 NAICS Definitions, NAICS 513340.

¹⁵ 13 CFR 120.121, NAICS code 513340.

¹⁶ U.S. Census Bureau, 1997 Economic Census, Subject Service: Information, "Establishment and Firm Size," Table 4, NAICS 513340 (Issued Oct. 2000).

¹⁷ 47 CFR 76.901(e). The Commission developed this definition based on its determinations that a small cable company is one with annual revenues of \$100 million or less. See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Doc. Nos. 92-266 and 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408-7409 ¶¶ 28-30 (1995).

¹⁸ Paul Kagan Assocs., Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

¹⁹ 47 U.S.C. 543(m)(2).

²⁰ See FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice, 16 FCC Rcd 2225 (2001).

²¹ 47 CFR 76.1403(b).

²² See FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice, 16 FCC Rcd 2225 (2001).

²³ We do receive such information on a case-by-case basis only if a cable operator appeals a local

4913 TV translators.²⁷ The FCC does not collect financial information on any broadcast facility and the Department of Commerce does not collect financial information on these auxiliary broadcast facilities. We believe, however, that most, if not all, of these auxiliary facilities could be classified as small businesses by themselves. We also recognize that most translators and boosters are owned by a parent station which, in some cases, would be covered by the revenue definition of small business entity as discussed previously. These stations would likely have annual revenues that exceed the SBA maximum to be designated as a small business (as noted, either \$6.0 million for a radio station or \$12.0 million for a TV station). Furthermore, they do not meet the Small Business Act's definition of a "small business concern" because they are not independently owned and operated.

4. *Microwave Services.* Microwave services include common carrier,²⁸ private-operational fixed,²⁹ and broadcast auxiliary radio services.³⁰ The proposed rules could affect all common carrier and private operational fixed microwave licensees who are authorized under Part 101 of the Commission's Rules. There is currently no definition of small entities applicable to these specific licensees. Therefore, the applicable small business size standard is the SBA size standard for "Cellular and Other Wireless Telecommunications," which provides that a small entity in this category is one employing no more than 1,500 persons.³¹ For 1997, there were 2,872 firms in this category, total, which operated for the entire year. Of this

total, only 25 had 1,000 or more employees.³²

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements: The rules adopted in this Order are not expected to result in any overall increase in the reporting, recordkeeping and other compliance requirements of any licensee. The new reporting requirements we adopt in this Order are generally minor, such as providing slightly more detail in the power flux density (PFD) information space station license applicants are already required to provide. These increases should be offset at least in part by the fact that standardizing some information requirements should make it easier to provide that information.

Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered: In this Order, we adopt a streamlined earth station application form designed to reduce the economic impact on all earth station applicants, including small entities.

We considered and rejected a proposal to eliminate our space station application information requirements and rely instead on information submitted to the ITU because we have no direct control over those information requirements and there is no guarantee that information submitted to the ITU rules will be adequate for U.S. operations.

Report to Congress: The Commission will send a copy of this Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of this Order, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this Order and FRFA (or summaries thereof) will also be published in the **Federal Register**. See 5 U.S.C. 604(b).

Summary of Report and Order

In this Third Report and Order, the Commission adopts two new filing forms. One form is Schedule S, which standardizes and consolidates much of the information required in satellite applications. The Commission adopts Schedule S as it was proposed in the Notice of Proposed Rulemaking, 67 FR 12498, Mar. 19, 2002, with the following exceptions: (1) On Tables S11, S12, and S13, the Commission eliminated some duplicative information requests, and rearranged the remaining information

requests on those tables so that they flow better; (2) specified a format for antenna gain contour diagrams for geostationary orbit (GSO) satellite applications only, not for non-geostationary orbit (GSO) satellite applications; and (3) provides a column for power flux density (PFD) reference bandwidth. Direct Broadcast Satellite (DBS) and non-U.S.-licensed satellite operators seeking access to the U.S. market are required to use Schedule S. The other form adopted in the Third Report and Order in this proceeding is "Form 312EZ," a streamlined version of Form 312 for routine conventional C-band and Ku-band earth station applications. In addition, the Commission eliminates Form 701, and renames Form 405 as Form 312-R. The Commission delegates to the International Bureau authority to make revisions to its electronic filing system needed to implement these new forms.

The Commission also adopts mandatory electronic filing for routine earth station license applications, and comments and petitions to deny in response to all earth station license applications. The Commission clarifies its rules for earth station license modifications. Furthermore, the Commission revises its rules to allow earth station applicants to specify more than one frequency band, and to specify both common carrier and non-common carrier service. Finally, the Commission eliminates some outmoded rules.

Ordering Clauses

Accordingly, pursuant to sections 4(i), 7(a), 11, 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 157(a), 161, 303(c), 303(f), 303(g), 303(r), that this Third Report and Order in IB Docket No. 02-34 and Third Report and Order in IB Docket No. 00-248 is hereby ADOPTED.

Part 25 of the Commission's rules is amended as set forth below.

The rule revisions contain information requirements that have not been approved by OMB. The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date.

Authority is delegated to the Chief, International Bureau, as set forth in this Order.

The Consumer Information Bureau, Reference Information Center, *Shall* send a copy of this Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 25

Satellites.

²⁷ FCC News Release, *Broadcast Station Totals as of September 30, 1999*, No. 71831 (Jan. 21, 1999).

²⁸ See 47 CFR part 101 (formerly, part 21 of the Commission's Rules).

²⁹ Persons eligible under parts 80 and 90 of the Commission's rules can use Private Operational-Fixed Microwave services. See 47 CFR parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

³⁰ Auxiliary Microwave Service is governed by part 74 of Title 47 of the Commission's Rules. See 47 CFR part 74 *et seq.* Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

³¹ 13 CFR 121.201, Standard Industrial Classification (SIC) Code 4812.

³² U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Employment Size of Establishments of Firms Subject to Federal Income Tax: 1997," Table 5, NAICS code 51332 (issued October 2000).

Federal Communications Commission.
Marlene H. Dortch,
Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 25 as follows:

PART 25—SATELLITE COMMUNICATIONS

■ 1. The authority citation for part 25 continues to read as follows:

Authority: 47 U.S.C. 701–744. Interprets or applies Sections 4, 301, 302, 303, 307, 309, and 332 of the Communications Act, as amended, 47 U.S.C. Sections 154, 301, 302, 303, 307, 309, and 332, unless otherwise noted.

■ 2. Amend § 25.103 by revising paragraphs (b) and (c)(2) to read as follows:

§ 25.103 Definitions.

* * * * *

(b) *Authorized carrier.* The term “authorized carrier” means a communications common carrier which is authorized by the Federal Communications Commission under the Communications Act of 1934, as amended, to provide services by means of communications satellites.

(c) * * *

(2) The corporation shall be deemed to be a common carrier within the meaning of section 3(10) of the Communications Act of 1934, as amended.

* * * * *

■ 3. Amend § 25.111 by revising paragraph (b) to read as follows:

§ 25.111 Additional information.

* * * * *

(b) Applicants, permittees and licensees of radio stations governed by this part shall provide the Commission with all information it requires for the Advance Publication, Coordination and Notification of frequency assignments pursuant to the international Radio Regulations. No protection from interference caused by radio stations authorized by other Administrations is guaranteed unless coordination procedures are timely completed or, with respect to individual administrations, by successfully completing coordination agreements. Any radio station authorization for which coordination has not been completed may be subject to additional terms and conditions as required to effect coordination of the frequency

assignments with other Administrations.

* * * * *

■ 4. Revise § 25.114 to read as follows:

§ 25.114 Applications for space station authorizations.

(a) A comprehensive proposal shall be submitted for each proposed space station on FCC Form 312, Main Form and Schedule S, together with attached exhibits as described in paragraph (d) of this section.

(b) Each application for a new or modified space station authorization must constitute a concrete proposal for Commission evaluation. Each application must also contain the formal waiver required by Section 304 of the Communications Act, 47 U.S.C. 304. The technical information for a proposed satellite system specified in paragraph (c) of this section must be filed on FCC Form 312, Main Form and Schedule S. The technical information for a proposed satellite system specified in paragraph (d) of this section need not be filed on any prescribed form but should be complete in all pertinent details. Applications for new space station authorizations other than authorizations for the Direct Broadcast Service (DBS) and Digital Audio Radio Satellite (DARS) service must be filed electronically through the International Bureau Filing System (IBFS).

(c) The following information shall be filed on FCC Form 312, Main Form and Schedule S:

(1) Name, address, and telephone number of the applicant;

(2) Name, address, and telephone number of the person(s), including counsel, to whom inquiries or correspondence should be directed;

(3) Type of authorization requested (e.g., launch authority, station license, modification of authorization);

(4)(i) Radio frequencies and polarization plan (including beacon, telemetry, and telecommand functions), center frequency and polarization of transponders (both receiving and transmitting frequencies),

(ii) Emission designators and allocated bandwidth of emission, final amplifier output power (identify any net losses between output of final amplifier and input of antenna and specify the maximum EIRP for each antenna beam),

(iii) Identification of which antenna beams are connected or switchable to each transponder and TT&C function,

(iv) Receiving system noise temperature,

(v) The relationship between satellite receive antenna gain pattern and gain-to-temperature ratio and saturation flux

density for each antenna beam (may be indicated on antenna gain plot),

(vi) The gain of each transponder channel (between output of receiving antenna and input of transmitting antenna) including any adjustable gain step capabilities, and

(vii) Predicted receiver and transmitter channel filter response characteristics.

(5) For satellites in geostationary-satellite orbit,

(i) Orbital location, or locations if alternatives are proposed, requested for the satellite,

(ii) The factors that support the orbital assignment or assignments proposed in paragraph (c)(5)(i) of this section,

(iii) Longitudinal tolerance or east-west station-keeping capability;

(iv) Inclination incursion or north-south station-keeping capability.

(6) For satellites in non-geostationary-satellite orbits,

(i) The number of space stations and applicable information relating to the number of orbital planes,

(ii) The inclination of the orbital plane(s),

(iii) The orbital period,

(iv) The apogee,

(v) The perigee,

(vi) The argument(s) of perigee,

(vii) Active service arc(s), and

(viii) Right ascension of the ascending node(s).

(7) For satellites in geostationary-satellite orbit, accuracy with which the orbital inclination, the antenna axis attitude, and longitudinal drift will be maintained;

(8) Calculation of power flux density levels within each coverage area and of the energy dispersal, if any, needed for compliance with § 25.208, for angles of arrival of 5°, 10°, 15°, 20°, and 25° above the horizontal;

(9) Arrangement for tracking, telemetry, and control;

(10) Physical characteristics of the space station including weight and dimensions of spacecraft, detailed mass (on ground and in-orbit) and power (beginning and end of life) budgets, and estimated operational lifetime and reliability of the space station and the basis for that estimate;

(11) A clear and detailed statement of whether the space station is to be operated on a common carrier basis, or whether non-common carrier transactions are proposed. If non-common carrier transactions are proposed, describe the nature of the transactions and specify the number of transponders to be offered on a non-common carrier basis;

(12) Dates by which construction will be commenced and completed, launch

date, and estimated date of placement into service.

(13) The polarization information specified in §§ 25.210(a)(1), (a)(3), and (i), to the extent applicable.

(d) The following information in narrative form shall be contained in each application:

(1) General description of overall system facilities, operations and services;

(2) If applicable, the feeder link and inter-satellite service frequencies requested for the satellite, together with any demonstration otherwise required by this chapter for use of those frequencies (see, *e.g.*, §§ 25.203(j) and (k));

(3) Predicted space station antenna gain contour(s) for each transmit and each receive antenna beam and nominal orbital location requested. These contour(s) should be plotted on an area map at 2 dB intervals down to 10 dB below the peak value of the parameter and at 5 dB intervals between 10 dB and 20 dB below the peak values, with the peak value and sense of polarization clearly specified on each plotted contour. For applications for geostationary orbit satellites, this information must be provided in the .gxt format.

(4) A description of the types of services to be provided, and the areas to be served, including a description of the transmission characteristics and performance objectives for each type of proposed service, details of the link noise budget, typical or baseline earth station parameters, modulation parameters, and overall link performance analysis (including an analysis of the effects of each contributing noise and interference source);

(5) Calculation of power flux density levels within each coverage area and of the energy dispersal, if any, needed for compliance with § 25.208; Calculation of power flux density levels within each coverage area and of the energy dispersal, if any, needed for compliance with § 25.208, for angles of arrival other than 5°, 10°, 15°, 20°, and 25° above the horizontal.

(6) Public interest considerations in support of grant;

(7) Applications for authorizations for fixed-satellite space stations shall also include the information specified in § 25.140;

(8) Applications for authorizations in the Mobile-Satellite Service in the 1545–1559/1646.5–1660.5 MHz frequency bands shall also provide all information necessary to comply with the policies and procedures set forth in Rules and Policies Pertaining to the Use

of Radio Frequencies in a Land Mobile Satellite Service, 2 FCC Rcd 485 (1987) (Available at address in § 0.445 of this chapter.);

(9) Applications to license multiple space station systems in the non-voice, non-geostationary mobile-satellite service under blanket operating authority shall also provide all information specified in § 25.142; and

(10) Applications for authorizations in the 1.6/2.4 GHz Mobile-Satellite Service shall also provide all information specified in § 25.143.

(11) In addition to a statement of whether the space station is to be operated on a common carrier basis, or whether non-common carrier transactions are proposed, as specified in paragraph (c)(11) of this section, satellite applications in the Direct Broadcast Satellite service must provide a clear and detailed statement of whether the space station is to be operated on a broadcast or non-broadcast basis.

(12) Applications for authorizations in the non-geostationary satellite orbit fixed-satellite service (NGSO FSS) in the bands 10.7 GHz to 14.5 GHz shall also provide all information specified in § 25.146.

(13) For satellite applications in the Direct Broadcast Satellite service, if the proposed system's technical characteristics differ from those specified in the Appendix 30 BSS Plans, the Appendix 30A feeder link Plans, Annex 5 to Appendix 30 or Annex 3 to Appendix 30A, each applicant shall provide:

(i) The information requested in Appendix 4 of the ITU's Radio Regulations. Further, applicants shall provide sufficient technical showing that the proposed system could operate satisfactorily if all assignments in the BSS and feeder link Plans were implemented.

(ii) Analyses of the proposed system with respect to the limits in Annex 1 to Appendices 30 and 30A.

(e) Applicants requesting authority to launch and operate a system comprised of technically identical, non-geostationary satellite orbit space stations may file a single "blanket" application containing the information specified in paragraphs (c) and (d) of this section for each representative space station.

■ 5. Amend § 25.115 by revising paragraph (a) to read as follows:

§ 25.115 Application for earth station authorizations.

(a) *Transmitting earth stations.* Except as provided under § 25.113(b) of this Chapter, Commission authorization

must be obtained for authority to construct and/or operate a transmitting earth station. Applications shall be filed on FCC Form 312, Main Form and Schedule B, and include the information specified in § 25.130.

(1) Applications for transmitting earth station facilities must be filed electronically through the International Bureau Filing System (IBFS) in all cases where the earth station:

(i) Will transmit in the 3700–4200 MHz and 5925–6425 MHz band, and/or the 11.7–12.2 GHz and 14.0–14.5 GHz band, and

(ii) Will meet all the applicable technical specifications set forth in this part.

(2) Applications for other earth station applications are permitted but not required to be filed electronically. Any party choosing to file an earth station application electronically must file in accordance with the pleading limitations, periods and other applicable provisions of §§ 1.41 through 1.52 of this chapter;

* * * * *

■ 6. Amend § 25.117 by revising paragraphs (a) and (c), and removing and reserving paragraphs (b) and (e), to read as follows:

§ 25.117 Modification of station license.

(a) Except as provided for in § 25.118 (Modifications not requiring prior authorization), no modification of a radio station governed by this part which affects the parameters or terms and conditions of the station authorization shall be made except upon application to and grant of such application by the Commission.

* * * * *

(c) Applications for modification of earth station authorizations shall be submitted on FCC Form 312, Main Form and Schedule B. Applications for modification of space station authorizations shall be submitted on FCC Form 312, Main Form and Schedule S. In addition, any application for modification of authorization to extend a required date of completion, as set forth in § 25.133 for earth station authorization or § 25.164 for space stations, or included as a condition of any earth station or space station authorization, must include a verified statement from the applicant:

(1) That states the additional time is required due to unforeseeable circumstances beyond the applicant's control, describes these circumstances with specificity, and justifies the precise extension period requested; or

(2) That states there are unique and overriding public interest concerns that

justify an extension, identifies these interests and justifies a precise extension period.

* * * * *

■ 7. Amend § 25.118 by revising paragraphs (a) and (b) and removing and reserving paragraphs (c) and (d) to read as follows:

§ 25.118 Modifications not requiring prior authorization.

(a) *Earth station license modifications, notification required.* Authorized earth station operators may make the following modifications to their licenses without prior Commission authorization, provided that the operators notify the Commission, using FCC Form 312 and Schedule B, within 30 days of the modification:

(1) Licensees may make changes to their authorized earth stations without obtaining prior Commission authorization, provided that they have complied with all applicable frequency coordination procedures in accordance with § 25.251, and the modification does not involve:

- (i) An increase in EIRP or EIRP density (both main lobe and side lobe);
- (ii) An increase in transmitted power;
- (iii) A change in coordinates of more than 1 second in latitude or longitude for stations operating in frequency bands that are shared with terrestrial systems; or
- (iv) A change in coordinates of 10 seconds or greater in latitude or longitude for stations operating in frequency bands that are not shared with terrestrial systems.

(2) Except for replacement of equipment where the new equipment is electrically identical to the existing equipment, an authorized earth station licensee may add, change or replace transmitters or antenna facilities without prior authorization, provided:

- (i) The added, changed, or replaced facilities conform to § 25.209;
- (ii) The particulars of operations remain unchanged;
- (iii) Frequency coordination is not required; and
- (iv) The maximum power and power density delivered into any antenna at the earth station site shall not exceed the values calculated by subtracting the maximum antenna gain specified in the license from the maximum authorized e.i.r.p. and e.i.r.p. density values.

(3) Authorized VSAT earth station operators may add VSAT remote terminals without prior authorization, provided that they have complied with all applicable frequency coordination procedures in accordance with § 25.251.

(4) A licensee providing service on a private carrier basis may change its

operations to common carrier status without obtaining prior Commission authorization. The licensee must notify the Commission using Form 312 within 30 days after the completed change to common carrier status.

(5) Earth station operators may change their points of communication without prior authorization, provided that the change results from a space station license modification described in paragraph (e) of this section, and the earth station operator does not re-point its antenna.

(b) *Earth station license modifications, notification not required.* Notwithstanding paragraph (a)(2) of this section, equipment in an authorized earth station may be replaced without prior authorization and without notifying the Commission if the new equipment is electrically identical to the existing equipment.

* * * * *

■ 8. Amend § 25.121 by revising paragraph (e) to read as follows:

§ 25.121 License term and renewals.

* * * * *

(e) *Renewal of licenses.* Applications for renewals of earth station licenses must be submitted on FCC Form 312R no earlier than 90 days, and no later than 30 days, before the expiration date of the license. Applications for space station system replacement authorization for non-geostationary orbit satellites shall be filed no earlier than 90 days, and no later than 30 days, prior to the end of the twelfth year of the existing license term.

■ 9. Amend § 25.131 by revising paragraphs (h) and (i) to read as follows:

§ 25.131 Filing requirements for receive-only earth stations.

* * * * *

(h) Registration term: Registrations for receive-only earth stations governed by this section will be issued for a period of 15 years from the date on which the application was filed. Applications for renewals of registrations must be submitted on FCC Form 312R (Application for Renewal of Radio Station License in Specified Services) no earlier than 90 days and no later than 30 days before the expiration date of the registration.

(i) Applications for modification of license or registration of receive-only earth stations shall be made in conformance with §§ 25.117 and 25.118. In addition, registrants are required to notify the Commission when a receive-only earth station is no longer operational or when it has not been

used to provide any service during any 6-month period.

* * * * *

§ 25.141 [Removed]

■ 10. Remove § 25.141.

Subpart H—[Removed and Reserved]

■ 11. Part 25 is amended by removing and reserving subpart H.

[FR Doc. 03–28170 Filed 11–10–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 51

[CC Docket Nos. 01–338; CC Docket No. 96–98; CC Docket No. 98–147; FCC 03–36]

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability

AGENCY: Federal Communications Commission.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to the final rules, which were published in the *Federal Register* (68 FR 52276, September 2, 2003). The rules established a new standard for determining the existence of impairment under section 251(d)(2) of the Communications Act of 1934, as amended, set forth a new list of unbundled network elements (UNEs), and created a specifically defined role for the states in the unbundling inquiry.

DATES: Effective October 2, 2003.

FOR FURTHER INFORMATION CONTACT: Jeremy Miller, Attorney-Advisor, Wireline Competition Bureau, at (202) 418–1580 or via the Internet at jmiller@fcc.gov.

SUPPLEMENTARY INFORMATION: On September 2, 2003, the *Federal Register* published a summary of the Commission's Report and Order and Order on Remand, adopted February 20, 2003, and released August 21, 2003, along with final rules adopted by the Commission. This document corrects those rules by replacing portions of §§ 51.318(b) through 51.319(d).

Need for Correction

1. As published, the final rules contain errors which may prove to be misleading and need to be clarified.

List of Subjects in 47 CFR Part 51

Interconnection, Telecommunications carriers.

■ 1. The authority citation for part 51 is revised to read as follows:

Authority: Sections 1–5, 7, 201–05, 207–09, 218, 225–27, 251–54, 256, 271, 303(r), 332, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151–55, 157, 201–05, 207–09, 218, 225–27, 251–54, 256, 271, 303(r), 332, 47 U.S.C. 157 *note*, unless otherwise noted.

■ 2. Revise paragraph 51.318(b) introductory text to read as follows:

§ 51.318 Eligibility criteria for access to certain unbundled network elements.

* * * * *

(b) An incumbent LEC need not provide access to an unbundled DS1 loop in combination, or commingled, with a dedicated DS1 transport or dedicated DS3 transport facility or service, or to an unbundled DS3 loop in combination, or commingled, with a dedicated DS3 transport facility or service, or an unbundled dedicated DS1 transport facility in combination, or commingled, with an unbundled DS1 loop or a DS1 channel termination service, or to an unbundled dedicated DS3 transport facility in combination, or commingled, with an unbundled DS1

loop or a DS1 channel termination service, or to an unbundled DS3 loop or a DS3 channel termination service, unless the requesting telecommunications carrier certifies that all of the following conditions are met:

* * * * *

■ 3. Section 51.319 is amended by revising paragraphs (a)(3) introductory text, (a)(3)(i), (d)(2)(iii)(A)(1) and (d)(2)(iii)(A)(2) to read as follows:

§ 51.319 Specific unbundling requirements.

(a) * * *

(3) *Fiber-to-the-home loops.* A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, and serving an end user's customer premises.

(i) *New builds.* An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop on an unbundled basis when the incumbent LEC deploys such a loop to an end user's customer premises that previously has not been served by any loop facility.

* * * * *

- (d) * * *
- (2) * * *
- (iii) * * *

(A) * * *

(1) *Local switching self-provisioning trigger.* To satisfy this trigger, a state commission must find that three or more competing providers not affiliated with each other or the incumbent LEC, including intermodal providers of service comparable in quality to that of the incumbent LEC, each are serving mass market customers in the particular market with the use of their own local switches.

(2) *Local switching competitive wholesale facilities trigger.* To satisfy this trigger, a state commission must find that two or more competing providers not affiliated with each other or the incumbent LEC, including intermodal providers of service comparable in quality to that of the incumbent LEC, each offer wholesale local switching service to customers serving DS0 capacity loops in that market using their own switches.

* * * * *

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–28243 Filed 11–10–03; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register

Vol. 68, No. 218

Wednesday, November 12, 2003

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003-NE-46-AD]

RIN 2120-AA64

Airworthiness Directives; General Electric Company CF6-80C2 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for General Electric Company (GE) CF6-80C2 series turbofan engines. This proposed AD would require replacing certain high pressure turbine (HPT) stage 1 disks at or before reaching a new reduced life cycle limit. This proposed AD is prompted by an updated low-cycle-fatigue (LCF) analysis of the HPT stage 1 disk. We are proposing this AD to prevent LCF cracking and failure of the HPT stage 1 disk due to exceeding the life limit, which could result in an uncontained engine failure and damage to the airplane.

DATES: We must receive any comments on this proposed AD by January 12, 2004.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD:

- By mail: Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003-NE-46-AD, 12 New England Executive Park, Burlington, MA 01803-5299.
- By fax: (781) 238-7055.
- By e-mail: 9-ane-adcomment@faa.gov.

You may examine the AD docket, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT:

Karen Curtis, Aerospace Engineer, Aircraft Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Office Park, Burlington, MA 01803; telephone (781) 238-7192; fax (781) 238-7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include "AD Docket No. 2003-NE-46-AD" in the subject line of your comments. If you want us to acknowledge receipt of your mailed comments, send us a self-addressed, stamped postcard with the docket number written on it; we will date-stamp your postcard and mail it back to you. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. If a person contacts us verbally, and that contact relates to a substantive part of this proposed AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We are reviewing the writing style we currently use in regulatory documents. We are interested in your comments on whether the style of this document is clear, and your suggestions to improve the clarity of our communications that affect you. You can get more information about plain language at <http://www.faa.gov/language> and <http://www.plainlanguage.gov>.

Examining the AD Docket

You may examine the AD Docket (including any comments and service information), by appointment, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. See **ADDRESSES** for the location.

Discussion

GE has completed an updated LCF analysis for the CF6-80C2A5F, CF6-80C2B5F, CF6-80C2B7F, and CF6-80C2D1F HPT stage 1 disks, part numbers (P/Ns) 1531M84G10 and 1531M84G12, and has established a new reduced life cycle limit of 10,720 cycles-since-new (CSN) for these disks. In January 2003, the FAA became aware of

GE's in-process analysis and material testing of HPT stage 1 disks, P/Ns 1531M84G10 and 1531M84G12. The FAA approved temporary revisions (TRs) to Chapter 5, Life Limits, of the engine manual (EM), to incorporate revised life limits for these disks based on initial analytical results. The original life limit of 13,200 CSN for these disks was last published in EM GEK 92451, Revision 57, dated March 1, 2003. TRs 05-0093 and 05-0094, dated May 15, 2003, revised this life limit from 13,200 CSN to 9,000 CSN. The FAA chose to wait for final analytical results before taking action to mandate a lower life limit. This wait was possible due to the young age of the affected disks. The high-cycle disk has accumulated fewer than 7,500 CSN at this time, which is well below the interim limit of 9,000 CSN and the final mandated limit. The FAA now approves GE's final analytical results and the reduced life limit of 10,720 CSN. GE issued TRs 05-0096 and 05-0097 on June 19, 2003 to revise the life limits section of the EM for CF6-80C2A5F, CF6-80C2B5F, CF6-80C2B7F, and CF6-80C2D1F HPT stage 1 disks, P/Ns 1531M84G10 and 1531M84G12, to 10,720 CSN. Although interim publications of the EM showed lower life limits for this part, those limits were not mandated by an AD. Therefore, an AD is now required to mandate the approved 10,720 CSN life limit.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. Therefore, we are proposing this AD, which would require replacing HPT stage 1 disks, P/Ns 1531M84G10 and 1531M84G12 at or before reaching a new reduced life cycle limit of 10,720 CSN.

Changes to 14 CFR Part 39—Effect on the Proposed AD

On July 10, 2002, we issued a new version of 14 CFR part 39 (67 FR 47998, July 22, 2002), which governs the FAA's AD system. This regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance. This material previously was included in each individual AD. Since this material

is included in 14 CFR part 39, we will not include it in future AD actions.

Costs of Compliance

There are about 526 CF6–80C2A5F, CF6–80C2B5F, CF6–80C2B7F, and CF6–80C2D1F turbofan engines of the affected design in the worldwide fleet. We estimate that 208 engines installed on airplanes of U.S. registry would be affected by this proposed AD. The proposed action does not impose any additional labor costs. The prorated cost of a new HPT stage 1 disk would cost approximately \$43,306 per engine. Based on these figures, and on the prorating for the usage of the HPT stage 1 disks, the cost of the proposed AD on U.S. operators is estimated to be \$9,007,648.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a “significant regulatory action” under Executive Order 12866;
2. Is not a “significant rule” under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this proposal and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under

ADDRESSES. Include “AD Docket No. 2003–NE–46–AD” in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive:

General Electric Company: Docket No. 2003–NE–46–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by January 12, 2004.

Affected ADs

(b) None.

Applicability

(c) This AD applies to General Electric Company (GE) CF6–80C2A5F, CF6–80C2B5F, CF6–80C2B7F, and CF6–80C2D1F turbofan engines with high pressure turbine (HPT) stage 1 disks, part numbers (P/Ns) 1531M84G10 or 1531M84G12 installed. These engines are installed on, but not limited to, Airbus Industrie A300 and A330 series, Boeing 747 and 767 series, and McDonnell Douglas MD–11 airplanes.

Unsafe Condition

(d) This AD was prompted by an updated low-cycle-fatigue (LCF) analysis of the HPT stage 1 disk. We are issuing this AD to prevent LCF cracking and failure of the HPT stage 1 disk due to exceeding the life limit, which could result in an uncontained engine failure and damage to the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified unless the actions have already been done.

(f) Replace HPT stage 1 disks, P/Ns 1531M84G10 and 1531M84G12, at or before the disk accumulates 10,720 cycles-since-new (CSN).

(g) After the effective date of this AD, do not install any HPT stage 1 disk, P/N 1531M84G10 or 1531M84G12, that exceeds 10,720 CSN.

Alternative Methods of Compliance

(h) The Manager, Engine Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Material Incorporated by Reference

(i) None.

Related Information

(j) None.

Issued in Burlington, Massachusetts, on November 4, 2003.

Peter A. White,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 03–28323 Filed 11–10–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–65–AD]

RIN 2120–AA64

Airworthiness Directives; Cessna Model 500, 501, 550, and 551 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking; reopening of comment period.

SUMMARY: This document revises an earlier proposed airworthiness directive (AD); applicable to certain Cessna Model 500, 501, 550, and 551 airplanes; that would have required inspection of the piston housing for an “SB” impression stamp; a one-time inspection of the brake assembly to detect cracked or broken brake stator disks; and replacement of the brake assembly with a new or serviceable assembly, if necessary. This new action revises the proposed rule by eliminating the inspection of the brake assembly to determine if the letters “SB” have been impression-stamped on the piston housing, and, instead, requiring a one-time inspection of the brake stator disks to determine to what change level they have been modified (if any), and follow-on actions if necessary. This new proposed AD would also require that the existing markings on the piston housing of certain brake assemblies be eliminated. The actions specified by this new proposed AD are intended to prevent wheel lockups that may be caused by cracked or broken brake stator disks becoming jammed in the brake assembly and preventing rotation. Such jamming of the brake assembly may result in reduced directional control or braking performance during landing. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by December 8, 2003.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2000–NM–65–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: 9-anm-

nprmcomment@faa.gov. Comments sent via fax or the Internet must contain "Docket No. 2000-NM-65-AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Cessna Aircraft Co., P.O. Box 7706, Wichita, Kansas 67277. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209.

FOR FURTHER INFORMATION CONTACT:

David Hirt, Aerospace Engineer, Systems and Propulsion Branch, ACE-116W, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209; telephone (316) 946-4156; fax (316) 946-4407.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (e.g., reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2000-NM-65-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 2000-NM-65-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to add an airworthiness directive (AD); applicable to certain Cessna Model 500, 501, 550, and 551 airplanes; was published as a notice of proposed rulemaking (NPRM) in the **Federal Register** on September 7, 2000 (65 FR 54182). That NPRM would have required inspection of the piston housing for an "SB" impression stamp; a one-time inspection of the brake assembly to detect cracked or broken brake stator disks; and replacement of the brake assembly with a new or serviceable assembly, if necessary. That NPRM was prompted by several reports of wheel lockups that appear to be caused by cracked or broken brake stator disks becoming jammed in the brake assembly and preventing rotation. Such jamming of the brake assembly may result in reduced directional control or braking performance during landing.

Actions Since Issuance of Previous Proposal

Since the issuance of that NPRM, BFGoodrich has issued Goodrich Service Bulletins 2-1528-32-2 (for airplanes equipped with BFGoodrich brake assembly part number (P/N) 2-1528-6) and 2-1530-32-2 (for airplanes equipped with BFGoodrich brake assembly P/N 2-1530-4), both Revision 5, both dated February 19, 2003. (The original NPRM refers to BFGoodrich Service Bulletins 2-1528-32-2 and 2-1530-32-2, both Revision 1, both dated February 3, 2000, as the appropriate source of service information for the actions proposed by that NPRM.) Revision 5 of the service bulletins eliminates the inspection of the brake assembly to determine if the letters "SB" have been impression-stamped on the piston housing. That action was described in earlier revisions of the service bulletins, and in paragraph (a) of the original NPRM, as a method of

determining whether it was necessary to inspect the brake stator disks for cracking. Since the issuance of the original NPRM, it has been determined that "SB" may be stamped on the piston housing of certain brake assemblies having stator disks that must be inspected for cracking. Thus, it is necessary to inspect all stator disks installed on BFGoodrich brake assemblies having P/N 2-1528-6 or 2-1530-4 to determine whether they are impression-stamped with "CHG AI" or with a change letter "B" or higher, and to inspect for cracking of subject stator disks and replace them if necessary.

Also since the issuance of the original NPRM, BFGoodrich has issued service bulletins 2-1528-32-3 (for BFGoodrich brake assembly P/N 2-1528-6) and 2-1530-32-3 (for BFGoodrich brake assembly P/N 2-1530-4), both dated March 23, 2000. Those service bulletins apply to BFGoodrich brake assemblies having P/N 2-1528-6 or 2-1530-4 that are used as spare parts. The service bulletins describe procedures for an inspection of the stator disks installed on those brake assemblies to determine whether they are impression-stamped with "CHG AI" or with a change letter "B" or higher, and replacement of subject stator disks with new disks.

Accomplishment of the actions specified in the applicable service bulletin is intended to adequately address the identified unsafe condition.

Differences Between Service Bulletins and Supplemental NPRM

This supplemental NPRM differs from the service bulletins in that for any stator disk not stamped with "CHG AI" or "CHG B" or a higher change letter, if the piston housing is impression-stamped with the letters "SB," this supplemental NPRM would require that the existing markings on the piston housing be removed by stamping "XX" over the letters "SB." Though the service bulletin does not specify this action, we find that it is necessary to require this action to ensure that it is evident that the actions proposed by this supplemental NPRM have been accomplished on the affected parts.

This supplemental NPRM also differs from the service bulletins in that it would require accomplishing an initial inspection to determine the change letter of the brake stator disks within 50 landings or 90 days after the effective date of this AD, whichever occurs first. We find that this compliance time is consistent with that proposed in the original NPRM and is adequate to ensure the continued flight safety of the affected airplane fleet. For any stator disk not stamped with "CHG AI" or

“CHG B” or a higher change letter, the compliance time for the detailed inspection for cracked or broken stator disks is consistent with the compliance time given in the service bulletin for those actions.

Comments

Due consideration has been given to the comments received from a single commenter in response to the original NPRM.

Request To Clarify Proposed Requirement

The commenter requests that the FAA revise paragraph (b) of the original NPRM to specify that the requirements of that paragraph need only be accomplished if “SB” is not impression-stamped on the piston housing. The commenter states that this would provide necessary clarification.

We do not concur. As explained previously, we have determined that even if “SB” is impression-stamped on the piston housing, all subject brake assemblies must be inspected to ensure that all stator disks are impression-stamped with “CHG A1” or with a change letter “B” or higher. We have made no change to the supplemental NPRM in this regard, other than the changes associated with the new service information described previously.

Request To Withdraw NPRM

The commenter, the brake manufacturer, believes that the current inspection criteria and fleet compliance has reasonably addressed the issue of broken brake stator disks and that the proposed AD is not required. The commenter makes the following statements to justify its request:

- A reduction in the repetitive interval for replacing brakes on airplanes operated in the most severe conditions appears to have greatly reduced the occurrence of stator failures.
- Since the issuance of the BFGoodrich service bulletins referenced in the original NPRM, the commenter is not aware of any additional reports of locked wheels caused by broken brake stator disks.
- Brakes and brake stator disks in spares inventories have been addressed through the issuance of BFGoodrich Service Bulletins 2-1528-32-3 and 2-1530-32-3.
- Operators of subject airplanes have been briefed about the problem of cracked or broken brake stator disks.
- Cessna reports that 70 percent of the worldwide fleet of affected airplanes have already complied with the actions

that would be required by the proposed AD.

We acknowledge the facts presented by the commenter. However, we do not agree that it is appropriate to withdraw the proposed AD. It is necessary to issue an AD to ensure that all affected airplanes are inspected and that the necessary corrective actions are accomplished to eliminate the unsafe condition. In addition, issuance of an AD also assists us in meeting our obligation to advise other civil airworthiness authorities of unsafe conditions identified in products manufactured in the United States, in accordance with various bilateral airworthiness agreements with countries around the world. Therefore, it is both warranted and necessary to issue this AD.

Request for Information on Additional Incidents

The commenter notes that it is aware of 3 reports of a locked wheel and 16 reports of broken stator disks. The commenter asks the FAA to provide it with information on additional reports of incidents of locked wheels resulting from broken brake stator disks.

We have not received any reports of locked wheels resulting from broken brake stator disks other than those noted by the commenter. We have made no change to the supplemental NPRM in this regard.

Request To Revise Cost Impact

The commenter requests that the cost information in the original NPRM be revised to reflect exactly the cost information provided in the relevant BFGoodrich service bulletins. We do not concur. It is our practice to round up work hour figures to a whole number, which is how we arrived at the work hour estimates provided in the original NPRM. We have made no change to the supplemental NPRM in this regard.

Explanation of Additional Change to Original NPRM

For clarification and to reflect model designations in the most recent revision of the Type Certificate Data Sheet for the affected airplanes, we have revised all references to “Cessna Model 500 series airplanes” in the original NPRM to refer to “Cessna Model 500, 501, 550, and 551 airplanes” in this supplemental NPRM.

Conclusion

Since the changes related to the newly issued service information expand the scope of the originally proposed rule, we have determined that it is necessary to reopen the comment period to

provide additional opportunity for public comment.

Changes to 14 CFR Part 39/Effect on the Proposed AD

On July 10, 2002, we issued a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs our AD system. This regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance (AMOCs). Because we have now included this material in part 39, only the office authorized to approve AMOCs is identified in each individual AD. Therefore, in this supplemental NPRM, we have removed Note 1 and paragraph (d) and revised paragraph (c) of the original NPRM.

Change to Labor Rate Estimate

Since the issuance of the original NPRM, we have reviewed the figures we have used over the past several years to calculate AD costs to operators. To account for various inflationary costs in the airline industry, we find it necessary to increase the labor rate used in these calculations from \$60 per work hour to \$65 per work hour. The cost impact information, below, reflects this increase in the specified hourly labor rate.

Cost Impact

There are approximately 370 airplanes of the affected design in the worldwide fleet. We estimate that 259 airplanes of U.S. registry would be affected by this proposed AD. It would take up to 1 work hour per airplane to accomplish the proposed inspection if the inspection were done at the time of a tire change and up to 4 work hours per airplane if the inspection were done at a different time, at an average labor rate of \$65 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be \$16,835, or \$65 per airplane, for inspections of the brake assembly done at the time of a tire change; or up to \$67,340, or \$260 per airplane, for inspections done at a different time.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up,

planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Cessna Airplane Company: Docket 2000–NM–65–AD.

Applicability: Model 500 and 501 airplanes, serial numbers 0001 through 0689 inclusive, and Model 550 and 551 airplanes, serial numbers 0002 through 0733 inclusive; certificated in any category; equipped with BFGoodrich brake assembly part number (P/N) 2–1528–6 or 2–1530–4.

Compliance: Required as indicated, unless accomplished previously.

To prevent jamming of the wheel/tire assembly, which could result in a loss of directional control or braking performance upon landing, accomplish the following:

Inspection of Stator Disks for Change Letter

(a) Within 50 landings or 90 days after the effective date of this AD, whichever is first, inspect the stator disks on the brake assembly to determine if "CHG A1" or "CHG B" or a higher change letter is impression-stamped on each disk, in accordance with Goodrich Service Bulletin 2–1528–32–2, Revision 5 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1528–6), or Goodrich Service Bulletin 2–1530–32–2, Revision 5, (for airplanes equipped with BFGoodrich brake assembly P/N 2–1530–4), both dated February 19, 2003, as applicable. If both disks are stamped with "CHG A1" or "CHG B" or a higher change letter, no further action is required by this paragraph. Instead of inspecting the stator disks, a review of airplane maintenance records is acceptable if the change letter of the stator disks can be positively determined from that review.

Inspection for Cracked or Broken Stator Disks

(b) For any stator disk not stamped with "CHG A1" or "CHG B" or a higher change letter: At the applicable compliance time specified in paragraph (b)(1) or (b)(2) of this AD, perform a detailed inspection for cracked or broken stator disks; in accordance with Goodrich Service Bulletin 2–1528–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1528–6), or Goodrich Service Bulletin 2–1530–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1530–4), both Revision 5, both dated February 19, 2003; as applicable.

(1) For airplanes that use thrust reversers: Inspect prior to the accumulation of 376 total landings on the brake assembly, or within 50 landings after the effective date of this AD, whichever is later.

(2) For airplanes that do not use thrust reversers: Inspect prior to the accumulation of 200 total landings on the brake assembly, or within 25 landings after the effective date of this AD, whichever is later.

Note 1: For the purposes of this AD, a detailed inspection is defined as: "An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required."

Follow-On Actions (No Cracked or Broken Stator Disk)

(c) If no cracked or broken stator disk is found, before further flight, reassemble the brake assembly and, if the piston housing is impression-stamped with the letters "SB," obliterate the existing markings on the piston housing by stamping "XX" over the letters "SB." If paragraph E.(3)(a) or E.(3)(b), as applicable, of Goodrich Service Bulletin 2–1528–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1528–6), or Goodrich Service Bulletin 2–1530–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1530–4), both Revision 5, both dated February 19, 2003; as

applicable; specifies repetitive inspections, repeat the inspection required by paragraph (b) of this AD at intervals not to exceed those specified in the service bulletin, until paragraph (e) of this AD is accomplished.

Corrective Action (Cracked or Broken Stator Disk)

(d) If any cracked or broken stator disk is found, prior to further flight, replace the brake assembly with a new or serviceable brake assembly; in accordance with Goodrich Service Bulletin 2–1528–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1528–6), or Goodrich Service Bulletin 2–1530–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1530–4), both Revision 5, both dated February 19, 2003; as applicable. If repetitive inspections are required per paragraph (c) of this AD, such replacement terminates those inspections.

Replacement of Brake Assembly

(e) When the brake assembly has accumulated 700 total landings since its installation or within 50 landings on the airplane after the effective date of this AD, whichever is later, replace the brake assembly with a new or serviceable brake assembly; in accordance with Goodrich Service Bulletin 2–1528–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1528–6), or Goodrich Service Bulletin 2–1530–32–2 (for airplanes equipped with BFGoodrich brake assembly P/N 2–1530–4), both Revision 5, both dated February 19, 2003; as applicable. If repetitive inspections are required per paragraph (c) of this AD, such replacement terminates those inspections.

Parts Installation

(f) As of the effective date of this AD, no person may install a BFGoodrich brake assembly on any airplane unless it has been inspected as specified in paragraph (f)(1) or (f)(2) of this AD, and found to be free of cracked or broken stator disks.

(1) For BFGoodrich brake assembly P/N 2–1528–6: Brake assembly must be inspected in accordance with paragraphs (a) and (b) of this AD, as applicable, in accordance with the service information specified in those paragraphs or BFGoodrich Service Bulletin 2–1528–32–3, dated March 23, 2000.

(2) For BFGoodrich brake assembly P/N 2–1530–4: Brake assembly must be inspected in accordance with paragraphs (a) and (b) of this AD, as applicable, in accordance with the service information specified in those paragraphs or BFGoodrich Service Bulletin 2–1530–32–3, dated March 23, 2000.

Alternative Methods of Compliance

(g) In accordance with 14 CFR 39.19, the Manager, Wichita Aircraft Certification Office (ACO), FAA, is authorized to approve alternative methods of compliance for this AD.

Issued in Renton, Washington, on November 4, 2003.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03-28324 Filed 11-10-03; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001-NM-359-AD]

RIN 2120-AA64

Airworthiness Directives; McDonnell Douglas Model DC-10-10, DC-10-10F, DC-10-15, DC-10-30, DC-10-30F (KC-10A and KDC-10), DC-10-40, DC-10-40F, MD-10-10F, MD-10-30F, MD-11, and MD-11F Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain McDonnell Douglas Model DC-10-10, DC-10-10F, DC-10-15, DC-10-30, DC-10-30F (KC-10A and KDC-10), DC-10-40, DC-10-40F, MD-10-10F, MD-10-30F, MD-11, and MD-11F airplanes. This proposal would require repetitive operation of the exterior emergency door handle of the forward passenger door to determine if binding exists in the exterior emergency control handle mechanism, and corrective action, if necessary. This action is necessary to prevent the failure of the exterior emergency control handle mechanism of the forward passenger door, which could delay an emergency evacuation. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by December 29, 2003.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 2001-NM-359-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227-1232. Comments may also be sent via the Internet using the following address: 9-anm-nprmcomment@faa.gov. Comments sent via fax or the Internet must contain

“Docket No. 2001-NM-359-AD” in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1-L5A (D800-0024). This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California.

FOR FURTHER INFORMATION CONTACT: Ken Sujishi, Aerospace Engineer, Systems and Equipment Branch, ANM-130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712-4137; telephone (562) 627-5353; fax (562) 627-5210.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (*e.g.*, reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: “Comments to Docket Number 2001-NM-359-AD.” The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 2001-NM-359-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion

The FAA has received a report indicating that the exterior emergency function of one of the passenger doors was inoperative on a McDonnell Douglas Model MD-11 airplane. The exterior emergency door handle would not move and activate the emergency function of the forward passenger door. The cause was revealed to be six corroded bearings that seized in the exterior door handle mechanism. This condition, if not corrected, could result in the failure of the exterior emergency control handle mechanism of the forward passenger door, which could delay an emergency evacuation.

Similar Models

The subject area on certain McDonnell Douglas Model DC-10-10, DC-10-10F, DC-10-15, DC-10-30, DC-10-30F (KC-10A and KDC-10), DC-10-40, DC-10-40F, MD-10-10F, MD-10-30F, and MD-11F airplanes is almost identical to that on the affected Model MD-11 airplanes. Therefore, all of these models may be subject to the same unsafe condition.

Other Related Rulemaking

The FAA is aware of a similar unsafe condition on the mid, overwing, and aft service doors on certain McDonnell Douglas Model DC-10-10, DC-10-10F, DC-10-15, DC-10-30, DC-10-30F (KC-10A and KDC-10), DC-10-40, DC-10-40F, MD-10-10F, MD-10-30F, MD-11 and MD-11F airplanes. We may consider future rulemaking actions to address the identified unsafe conditions.

Explanation of Relevant Service Information

The FAA has reviewed and approved McDonnell Douglas Service Bulletin MD11-52-046, Revision 02, dated October 8, 2002 (for Model MD-11 and MD-11F airplanes); and McDonnell Douglas Service Bulletin DC10-52-221,

Revision 01, dated May 6, 2002 (for Model DC-10-10, DC-10-10F, DC-10-15, DC-10-30, DC-10-30F (KC-10A and KDC-10), DC-10-40, DC-10-40F, MD-10-10F, and MD-10-30F airplanes). Both service bulletins describe procedures for repetitive operation of the exterior emergency door handle of the forward passenger door to determine if binding exists in the exterior emergency control handle mechanism, and corrective action, if necessary. The corrective action is replacing the six bearings in the exterior emergency control handle mechanism of the forward passenger door with bearings made from corrosion resistant materials. Accomplishment of the actions specified in the service bulletins is intended to adequately address the identified unsafe condition.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require accomplishment of the actions specified in the service bulletins described previously, except as discussed below.

Differences Between Proposed Rule and Service Bulletins

Operators should note that, although the service bulletins include a procedure to replace the lower torque shaft bearings, this proposed AD does not mandate such replacement. Replacement of the lower torque shaft bearings does not address the identified unsafe condition of this AD.

Operators should also note that, although the service bulletins would require the replacement of seven bearings in the exterior emergency control handle mechanism, this proposed AD would require the replacement of only six bearings. The manufacturer has informed the FAA that a typographical error was made in the service bulletin, and that there are only six bearings that need to be replaced in the exterior emergency control handle mechanism. The manufacturer is planning to issue a new revision of the service bulletins to indicate this change.

Cost Impact

There are approximately 604 airplanes of the affected design in the worldwide fleet. The FAA estimates that 396 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 1 work hour per airplane to accomplish the proposed repetitive operation of the exterior

emergency door handle of the forward passenger door, and that the average labor rate is \$65 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be \$25,740, or \$65 per airplane, per operation.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this proposed AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

McDonnell Douglas: Docket 2001-NM-359-AD.

Applicability: Model MD-11 and MD-11F airplanes; as listed in Boeing Service Bulletin MD11-52-046, Revision 02, dated October 8, 2002; and Model DC-10-10, DC-10-10F, DC-10-15, DC-10-30, DC-10-30F (KC-10A and KDC-10), DC-10-40, DC-10-40F, MD-10-10F, and MD-10-30F airplanes; as listed in Boeing Service Bulletin DC10-52-221, Revision 01, dated May 6, 2002; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent the failure of the exterior emergency control handle mechanism of the forward passenger door, which could delay an emergency evacuation, accomplish the following:

Note 1: Where there are differences between the referenced service bulletins and the AD, the AD prevails.

Initial Operation

(a) Within 6,000 flight hours or 18 months after the effective date of this AD, whichever occurs later: Operate the exterior emergency door handle of the forward passenger door to determine if binding exists in the exterior emergency control handle mechanism, in accordance with the Accomplishment Instructions of Boeing Service Bulletin MD11-52-046, Revision 02, dated October 8, 2002 (for Model MD-11 and MD-11F airplanes); or Boeing Service Bulletin DC10-52-221, Revision 01, dated May 6, 2002 (for Model DC-10-10, DC-10-10F, DC-10-15, DC-10-30, DC-10-30F (KC-10A and KDC-10), DC-10-40, DC-10-40F, MD-10-10F, and MD-10-30F airplanes); as applicable.

Condition 1—No Binding

(b) If there is no binding in the exterior emergency control handle mechanism during the operation required by paragraph (a) of this AD: Perform the action in either paragraph (b)(1) or (b)(2) of this AD in accordance with the Accomplishment Instructions of Boeing Service Bulletin MD11-52-046, Revision 02, dated October 8, 2002 (for Model MD-11 and MD-11F airplanes); or Boeing Service Bulletin DC10-52-221, Revision 01, dated May 6, 2002 (for Model DC-10-10, DC-10-10F, DC-10-15, DC-10-30, DC-10-30F (KC-10A and KDC-10), DC-10-40, DC-10-40F, MD-10-10F, and MD-10-30F airplanes); as applicable:

(1) Repeat the operation of the exterior emergency door handle of the forward passenger door thereafter at intervals not to exceed 6,000 flight hours or 18 months, whichever occurs later.

(2) Replace the six bearings in the exterior emergency control handle mechanism of the

forward passenger door with bearings made from corrosion resistant materials. Accomplishment of the replacement constitutes terminating action for the requirements of this AD.

Condition 2—Binding

(c) If there is binding in the exterior emergency control handle mechanism during any operation required by paragraph (a) or (b)(1) of this AD: Before further flight, replace the six bearings in the exterior emergency control handle mechanism of the forward passenger door with bearings made from corrosion resistant materials in accordance with the Accomplishment Instructions of Boeing Service Bulletin MD11-52-046, Revision 02, dated October 8, 2002 (for Model MD-11 and MD-11F airplanes); or Boeing Service Bulletin DC10-52-221, Revision 01, dated May 6, 2002 (for Model DC-10-10, DC-10-10F, DC-10-15, DC-10-30, DC-10-30F (KC-10A and KDC-10), DC-10-40, DC-10-40F, MD-10-10F, and MD-10-30F airplanes); as applicable. Accomplishment of the replacement constitutes terminating action for the requirements of this AD.

Alternative Methods of Compliance

(d) In accordance with 14 CFR 39.19, the Manager, Los Angeles Aircraft Certification Office, FAA, is authorized to approve alternative methods of compliance for this AD.

Issued in Renton, Washington, on November 4, 2003.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03-28325 Filed 11-10-03; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA-2003-16120; Airspace Docket No. 03-AEA-12]

Proposed Amendment to Class E Airspace; Jamestown, NY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to amend the Class E airspace area at Jamestown, NY. The development of a Standard Instrument Approach Procedure (SIAP) based on area navigation (RNAV) to serve flights into WCA Hospital Heliport under Instrument Flight Rules (IFR) has made this proposal necessary. Controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to contain aircraft executing the approach. The area would be depicted

on aeronautical charts for pilot reference.

DATES: Comments must be received on or before December 12, 2003.

ADDRESSES: Send comments on the proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590-0001. You must identify the docket number FAA-2003-16120/Airspace Docket No. 03-AEA-12 at the beginning of your comments. You may also submit comments on the Internet at <http://dms.dot.gov>.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1-800-647-5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division, Federal Aviation Administration, Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434-4809.

FOR FURTHER INFORMATION CONTACT: Mr. Francis T. Jordan, Jr., Airspace Specialist, Airspace Branch, AEA-520, Eastern Region, 1 Aviation Plaza, Jamaica, NY 11434-4809, telephone: (718) 553-4521.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA-2003-16120/Airspace Docket No. 03-AEA-12." The postcard will be date/time stamped and returned to the customer.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at <http://dms.dot.gov>. Recently published rulemaking documents can also be accessed through the FAA's Web page at <http://www.faa.gov> or the Superintendent of Documents web page at <http://www.access.gpo.gov/nara>.

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration, Office of Air Traffic Airspace Management, ATA-400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267-9677, to request a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to amend the Class E airspace area at Jamestown, NY. The development of a SIAP to serve flights operating IFR into WCA Hospital Heliport make this action necessary. Controlled airspace extending upward from 700 feet AGL is needed to accommodate the SIAPs. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface are published in Paragraph 6005 of FAA Order 7400.9K, dated August 30, 2002, and effective September 16, 2002, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that would only affect air traffic procedures and air navigation, it is certified that this proposed rule would not have significant economic impact on a substantial number of small

entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854; 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9K, dated September 16, 2003, and effective September 15, 2004, is proposed to be amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AEA NY E5 Jamestown, NY (Revised)

Chautauqua County/Jamestown Airport,
Jamestown, NY

(Lat. 42°09'12" N., long. 74°15'29" W.)

WCA Hospital Heliport

(Lat. 42°05'24" N., long. 79°13'50" W.)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of Chautauqua County/Jamestown Airport and within 2.2 miles each side of the Runway 31 extended centerline extending from the 6.6-mile radius to 7 miles northwest of the runway and within 2.2 miles each side of Runway 13 extended centerline extending from the 6.6-mile radius to 7.9 miles southeast of the runway and within a 6-mile radius of WCA Hospital Heliport.

* * * * *

Issued in Jamaica, New York, on September 15, 2003.

John G. McCartney,

*Assistant Manager, Air Traffic Division,
Eastern Region.*

[FR Doc. 03–28346 Filed 11–10–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 740, 742, 748, 754, and 772

[Docket No. 030425102–3102–01]

RIN 0694–AC20

Mandatory Use of Simplified Network Application Processing System

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the Export Administration Regulations (EAR) to implement a revised version of the Bureau of Industry and Security's (BIS) Simplified Network Application Processing (SNAP+) system (hereinafter, the version of the Bureau of Industry and Security's Simplified Network Application Processing system that currently exists shall be referred to as SNAP, while the version that is proposed in this rule shall be referred to as SNAP+). This proposed rule also would mandate use of SNAP+ for all filings of Export License applications (except Special Comprehensive Licenses), Reexport Authorization requests, Classification requests, Encryption Review requests, and License Exception AGR notifications unless BIS authorizes paper filing for a particular user or transaction. The requirement to use SNAP+ also would apply to any documentation required to be submitted with applications, requests or notifications. This proposed rule also would continue some provisions of the regulations associated with SNAP and other electronic filing systems that BIS has used in the past until a SNAP user's account is converted to SNAP+. Examples of these provisions include the requirements imposed on companies and individuals to protect the integrity of identification numbers. Other provisions, such as the requirement to maintain a log of submissions filed before being converted to SNAP+ would continue in effect even after an existing user is converted to SNAP+ for the period of time specified by Part 762 of the regulations. This proposed rule also would amend the EAR to require that requests for advisory opinions include the Export Control Classification Number of the item(s) at issue, to require item Classification Requests include a recommended ECCN, to replace some address listings in the regulations with references to BIS forms that contain those addresses, and to

correct some omissions, misstatements and typographical errors.

DATES: Comments must be received by January 12, 2004.

ADDRESSES: Written comments should be e-mailed to: rpdp@bis.doc.gov, faxed to 202–482–3355, or mailed or delivered to Regulatory Policy Division, Office of Exporter Services, Bureau of Industry and Security, Department of Commerce, 14th and Pennsylvania Avenue, NW., Room 2705, Washington, DC 20230. Reference Regulatory Identification Number 0694–AC20 in all comments.

FOR FURTHER INFORMATION CONTACT: For information concerning SNAP+, contact George Ipock, Office of Administration: e-mail gipock@bis.doc.gov, telephone: (202) 482–5469. For information concerning other matters raised by this proposed rule, contact William Arvin, Office of Exporter Services: e-mail warvin@bis.doc.gov, telephone (202) 482–2440.

SUPPLEMENTARY INFORMATION:

Background

The Bureau of Industry and Security (BIS) administers export license, notification, and reporting requirements for a number of export and reexport transactions based on the nature of the item being exported or reexported, its intended destination, the end-user, and the end-use. In addition, BIS provides advice to persons concerning the classification of items that may be subject to the Export Administration Regulations and advisory opinions regarding the applicability of the Export Administration Regulations to particular transactions. The public obtains all of these services, except advisory opinions, by submitting a paper form or by submitting the information electronically, either through the SNAP system or through one of several systems maintained by private vendors. Recently, a majority of the submissions for which an electronic vehicle is available have been submitted electronically. Heretofore, the electronic submission vehicles have not provided for electronic submission of supporting documents or other documents that relate to an application, request, or report. SNAP+ would permit submissions via the World Wide Web using a Web browser and would have the capability to “attach” images (as PDF files) of related documents to applications or requests. It would also incorporate security features that were not available when electronic filing of export license applications began in the mid 1980s. Accordingly, BIS is proposing to amend the Export Administration Regulations to require

that all export license applications (except Special Comprehensive Licenses), reexport license applications, Classification Requests, encryption review requests, and notifications prior to shipments of food and agricultural commodities to Cuba under License Exception AGR, along with any supporting or related documents be submitted via SNAP+. Any supporting or related documents attached to the submission would have to be in PDF format and, if they contain text, would have to be text searchable. BIS would consider requests for exceptions to the mandatory electronic filing rule and grant them in the following circumstances:

- A filer who has made no more than three submissions to BIS in the preceding twelve months;
- A filer who lacks access to the Internet;
- BIS has rejected the filer's request or revoked its eligibility to file electronically;
- BIS has requested that the filer submit a paper document for a particular transaction; or
- BIS determines that urgent circumstances or circumstances beyond the filer's control require allowing paper filing in a particular case.

BIS is aware of the possibility that some applicants might have to acquire certain hardware or software to be able to comply with this proposed rule. BIS also is aware that current electronic filers who use systems other than SNAP would have to begin using SNAP+ (or have an authorized agent acting on their behalf use SNAP+) in order to comply with this proposed rule unless one of the foregoing exceptions applies. BIS is interested in comments that address the benefits and burdens associated with these requirements.

SNAP+ would eliminate the registration of individual users by paper communication with BIS. Instead, a person may begin the registration process on behalf of himself or herself or may register an entity such as a corporation online. That person would be required to provide the following information concerning the SNAP+ applicant:

- Name of SNAP+ applicant;
- Address of SNAP+ applicant;
- "Organization Type," whether the SNAP+ applicant is an individual or an entity other than an individual;
- Its "Employee Identification Number" if the SNAP+ applicant is not an individual and is located in the United States;
- The name, telephone number, and e-mail address of the SNAP+ applicant's "designated official;" and

- The name, telephone number, and e-mail address of the SNAP+ applicant's initial organization administrator.

The SNAP+ system would then generate a paper document called an electronic submission certification, which explains the major responsibilities of SNAP+ users, for the designated official to sign and submit to BIS. BIS would notify the designated official by e-mail of its approval or rejection of the application to use SNAP+.

BIS is also proposing to convert existing SNAP users to SNAP+ through the following process. BIS would send a letter to each existing SNAP user informing it of the date on which it will be converted to the new system. The letter will also inform the existing SNAP user that a person who knows the existing user's current SNAP company identification number must log onto the system to provide the name and contact information of the individuals who the existing user determines will be Organization Administrator and Designated Official in the SNAP+ system. Existing SNAP users will not be able to use SNAP on or after the conversion date until this step is taken. In addition, the letter will describe the roles of the Organization Administrator and Certifiers, as set forth below. BIS anticipates that it will not convert all of the existing SNAP users to SNAP+ at the same time and that the conversion process may take several months starting on the day that SNAP+ is implemented.

SNAP+ would also create some new roles with specific responsibilities in the SNAP+ system. Those roles, which apply to both new SNAP+ users and to existing SNAP users when they are converted to the SNAP+ system by BIS would be:

- **SNAP+ Applicant.** The entity or individual that applies to use SNAP+ to submit documents to BIS.
- **SNAP+ User.** The individual or entity that has been authorized to submit documents via SNAP+.
- **Designated Official.** The individual who executes, on behalf of the SNAP+ applicant, the application to use the SNAP+ system.
- **Organization Administrator.** An individual who can enable other people to use the SNAP+ system on a particular SNAP+ user's behalf and who can assign roles to, remove roles from, or eliminate all access to SNAP+ for those people. Those roles include additional organization administrators (who can do all of the tasks that the initial organization administrator can do), as well as certifiers, stagers and viewers.

- **Certifier.** An individual who can submit to BIS, on behalf of a SNAP+ user, any type of submission that is available via the SNAP+ system at the time of submission, even if that type of submission was not available at the time that he/she became a certifier, and who can make representations to BIS, on the SNAP+ user's behalf, as to the truth, accuracy and completeness of that submission. BIS will treat submissions made in the SNAP+ system by any of the SNAP+ user's certifiers as representations by the SNAP+ user to the United States Government until the certifier's role is terminated in the SNAP+ system by one of SNAP+ user's organization administrators or by BIS.

- **Stager.** An individual who can enter information and documents into the SNAP+ system on behalf of a SNAP+ User for submission to BIS by a certifier.

- **Viewer.** An individual who is able to view information and documents in the SNAP+ system, but is unable to enter, modify or certify any information or documents.

- **Agents.** An individual or entity who submits documents via SNAP+ for another party. An agent would be required to notify BIS immediately if his authority to do so is terminated. This provision is needed so that BIS can terminate any access that the agent would have in the SNAP+ system to information about a former client that is protected from disclosure by the confidentiality provisions of the Export Administration Act. Within the SNAP+ system, such agents are referred to as "third parties."

BIS is also proposing to eliminate some obsolete, redundant or incorrect references in Part 748 of the Export Administration Regulations, eliminate an inconsistency, add information that had been omitted and replace some addresses listed in the regulations with references to BIS forms containing those addresses.

This proposed rule would make the following specific amendments to the Export Administration Regulations.

In part 740, § 740.17(d)(1) would be amended to make clear that review requests for License Exception ENC must be filed via SNAP+ unless BIS authorizes use of the paper form BIS-748P, that documents submitted in connection with SNAP+ submissions must be in "PDF" format and, if they contain text, must be text searchable. The reference to § 748.2(c) for the addresses for submitting license applications would be replaced with a reference to the addresses preprinted on the form. Section 740.18(c)(2) would be amended to replace language that makes use of electronic filing optional with

language that makes use of SNAP+ mandatory unless BIS has approved the applicant for paper filing, that documents submitted in connection with SNAP+ submissions must be in "PDF" format and, if they contain text, must be text searchable. Language referring to block numbers on the form would be replaced by names of blocks or fields because SNAP+ does not use block numbers.

In part 742, § 742.15(b)(2)(i) would be amended to make clear that SNAP+ must be used for requests to review encryption items exceeding 64 bit key length for mass market status and to replace the reference to § 748.2(c) for the addresses for submitting license applications with a reference to the addresses preprinted on the form. Supplement No. 6 to part 742 would be amended by having its introductory paragraph revised to replace language that makes use of electronic filing optional with language that makes use of SNAP+ mandatory unless BIS has approved the applicant for paper filing. Provisions regarding use of couriers or fax for paper documents related to electronic applications would also be removed because the new SNAP+ system will provide for "attachment" of electronic images of such documents to filings.

In part 748, §§ 748.1, 748.2, 748.3, 748.4, 748.5, 748.6, 748.7, 748.9, 748.10, 748.11, 748.12, 748.14, Supplement No. 1, and Supplement No. 2 would be amended as follows.

Section 748.1, paragraph (a) would be amended to reverse the order in which paper and electronic submissions are mentioned to emphasize electronic submissions. It would also be amended to add encryption review requests and license exception notifications to the listing of submission to which part 748 applies. The last sentence of this paragraph would also be removed because it is superfluous. Two new paragraphs (d) and (e) would be added. Paragraph (d) would make use of SNAP+ mandatory for all license applications (except Special Comprehensive Licenses), Classification Requests, Encryption Review requests, and License Exception AGR notifications unless BIS authorizes paper filing. Paragraph (e) would establish the grounds under which BIS would grant authorization to use paper filing, the procedures for requesting authorization to use paper filing and the method by which BIS would notify a party of its decision. The proposed grounds justifying paper filing are: three or fewer filings in the preceding 12 months, lack of access to the Internet, rejection or revocation of electronic

filing authorization by BIS, request by BIS that a filing for a particular transaction be submitted on paper, and when BIS determines that urgent circumstances or circumstances beyond the filer's control require paper filing in a particular instance.

Section 748.2 paragraph (c) would be amended by changing the first word from "All" to "Paper" because it provides the mailing address for paper applications and to replace the listing of the addresses to which paper applications may be submitted with a reference to the addresses listed on the paper forms.

Section 748.3 would be amended to revise paragraph (b) to make electronic filing via SNAP+ mandatory unless BIS grants an exception pursuant to § 748.1(e) and to replace references to block numbers on the paper application form with names or by describing the information that must be provided when seeking a Classification. This change is needed because SNAP+ will not contain block numbers. The proposal would require that documents submitted in connection with a Classification Request be submitted in "PDF" format and be text searchable, if they contain text. It would also amend paragraph (b) to replace the listing of addresses to which Classification Requests must be sent to a reference to the addresses on the application form. Paragraph (c)(2)(iii) would be amended to require the requestor to provide an Export Control Classification Number or a statement that the item is EAR99 for all Advisory Opinion requests. Classification Requests will be clearly designated as such and evaluated separately from Advisory Opinions. BIS will not provide both a Classification and an Advisory Opinion in a response to a single request. This change will allow BIS to ensure that all Classification Requests are properly recorded and will help promote consistent results when evaluating Classification Requests.

Section 748.4 would be amended by revising the third sentence in paragraph (b)(1) to replace the word "should" with the word "must" in describing the responsibility to disclose all parties to a transaction and the functions to be performed by each party. Block numbers throughout the paragraph would be replaced with names. Paragraph (b)(2)(ii) would be amended to implement the SNAP+ requirement that an agent who files on behalf of others and who is required to have a power of attorney or other written authorization to do so, register as a "Third Party" in SNAP+ and to replace block numbers with names. Paragraph (g) also would be

amended to replace block numbers with names.

Section 748.5 would be amended by revising the introductory paragraph to replace separate references to paper and electronic applications with the single term "applications" and by revising paragraph (b) to replace a block number with a name.

Section 748.6 would be amended by revising paragraph (a) to make clear that license applications must be filed via SNAP+ unless BIS has authorized paper filing. Paragraph (e) would be amended to provide that references to the application control number must appear on documents submitted in connection with license applications submitted on paper; and that documents submitted in connection with applications filed via SNAP+ must be in "PDF" format and must be text searchable if they contain text.

Section 748.7 would be almost entirely rewritten. Provisions relating to applying by mail to use electronic filing, registration by BIS of each individual who is to use electronic filing, and assignment of company identification numbers and personal identification numbers would be removed. Requirements relating to use of company identification numbers and personal identification numbers would continue to apply to companies and individuals already authorized to file electronically until their accounts are converted to SNAP+. BIS anticipates that these requirements can be removed once all electronic filers are converted to SNAP+, a process that may take several months starting on the date that SNAP+ is implemented initially. The prohibitions against copying, stealing or using another person's personal identification number would remain in effect without limitation as would the requirement to keep a log of electronic filings made prior to conversion to SNAP+ (users of SNAP+ would not be required to keep such a log). New material would be added as follows. Paragraph (a) would reiterate that all electronic submissions must be made through SNAP+. Paragraph (b)(1) would establish the procedures for new applicants to use SNAP+. It would set forth the information that a SNAP+ applicant must provide and how to provide it, how BIS would communicate its response to the SNAP+ applicant and would establish some specific responsibilities for users of SNAP+. This section would require applicants to use SNAP+ to provide the name and address of the SNAP+ applicant, and whether the SNAP+ applicant is an individual or an entity other than an individual (referred to as "industry" in

SNAP+). If the SNAP+ applicant is not an individual and is located in the United States, this section requires it to provide its Employer Identification Number. All SNAP+ applicants are also required to provide name, telephone number and e-mail address of the SNAP+ applicant's "Designated Official" and initial Organization Administrator. Paragraph (b)(2) establishes a procedure for notifying existing SNAP Users of the conversion to SNAP+ and of the information that the existing user must provide at the time of conversion. The SNAP User would have to provide that name and contact information of its initial Designated Official and Organization Administrator. Paragraph (c) would describe the roles and responsibilities of parties related to SNAP+. Paragraph (d) would describe requirements and prohibitions of SNAP that would continue in force after implementation of SNAP+. Paragraph (e) would describe responsibilities of parties who use current electronic submission systems that would continue until conversion to SNAP+.

Section 748.9 would be amended by revising paragraph (c) to make clear that license applicants using electronic submissions must designate on the appropriate data entry screen the type of supporting document they have obtained.

Sections 748.10(f), 748.11(a)(2), 748.12(d)(1), 748.14(b) would be amended to replace block numbers with names. In addition, § 748.10(g) would be amended to allow an electronic image of the PRC End User Certificate to be submitted in support of license applications filed via SNAP+ provided the applicant retains the original in its files. The original certificate would continue to be required for applications submitted on paper. Section 748.12(d) would be amended to make clear that requests for exceptions to a support document requirement may be submitted as electronic attachments to a license application filed via SNAP+. Section 748.14(b) would be amended to make clear that all of the recordkeeping requirements of part 762 and not just § 762.2 apply to firearms import certificates retained by a license applicant and § 748.14(e) would be amended to replace the term "BIS Form-748P" with "application" because it applies to both paper and electronic applications.

Supplement No. 1 to Part 748 would be amended to add references to SNAP+, Export License applications, Reexport Application requests, Classification Requests, Encryption Review requests, and License Exception

AGR notifications and to state that its requirements apply to all of those types of submissions, unless specifically noted, regardless of whether submitted via SNAP+ or on paper. The descriptions of transactions that constitute reexports would be revised to make them more completely reflect the definition of that term in part 772. Clarifying language would be added to describe when information about ultimate consignees must be submitted. Language that makes submission of an item in SNAP+ the equivalent of a signature would be added. This supplement would also be amended to place in a single paragraph, the requirement to include the earlier application control number when reapplying for a transaction that has been previously denied or returned without action (RWA). The existing supplement lists this requirement separately for denials and RWA's.

Supplement No. 2 to Part 748 would be amended throughout to replace references to block numbers with block or field names because SNAP+ does not use block numbers. In addition, paragraph (c)(2) would be amended to delete references to Advisory Notes 3 and 4 in Category 4 of the Commerce Control List because those Advisory Notes no longer exist. Paragraph (c)(2)(i) would be amended to allow submission of facsimiles of required signed statements by the end-user or importing agency because electronic images of such documents will have to be submitted under SNAP+. A new paragraph (c)(3) would be created requiring that originals be retained in accordance with the recordkeeping requirements of the EAR. In paragraph (f), a reference to § 734.2(b)(8) would be corrected to read § 736.2(b)(8). In paragraph (g)(2)(v), the words "if possible" would be removed from the second sentence to more clearly reflect long-standing policy, which requires full disclosure of how the item proposed for export will be used in the sensitive nuclear end-uses to which this paragraph applies.

In part 754, §§ 754.2(g)(1), 754.4(d)(1) and (3), 754.5(b)(2) and supplement No. 2, footnote number 2 would all be revised to replace language requiring use of the paper form BXA-748P with a requirement to use SNAP+ unless BIS approves the use of the paper form and to replace other references to the BXA-748P with the term "application," which could apply to both electronic and paper applications. § 754.4(d) also would be amended to allow applications for exports of unprocessed western red cedar filed through SNAP+ to include the exporter's statement in

the additional information field of the SNAP+ application screen or as an electronic attachment to the application and to make the electronic certification of the application act as a signature on the statement rather than requiring a separate signed statement as is done with paper applications.

Section 772.1 would be amended by adding a sentence to the end to the definition of the term "Applicant" to make clear that the definition does not apply to the term "SNAP+ Applicant" in § 748.7. This change is needed to make sure that rules that apply uniquely to applications to use SNAP+ are clearly distinguished from the rules governing applications in general.

Rulemaking Requirements

1. This proposed rule has been determined to be not significant for purposes of E.O. 12866.

2. This proposed rule contains revised collection-of-information requirements subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). The OMB control number for this collection is 0694-0088. The requirement for most exporters to register with and use Simplified Network Application Processing (SNAP+) will be submitted to OMB for approval. The public reporting burden for this collection of information is estimated to average 58 minutes per application, depending on the nature of the submission and any relevant supplemental information required to support the submission, as well as the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this collection of information to Ms. Marna Dove; Information Collection Budget Liaison, room H6622, Bureau of Industry and Security, U.S. Department of Commerce, Washington, DC 20230 and to OMB at the Office of Information and Regulatory Affairs, Washington, DC 20503 (Attention: BIS Desk Officer). Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

3. This rule does not contain policies with Federalism implications as this term is defined in Executive Order 13132.

4. The Chief Counsel for Regulation of the Department of Commerce has

certified to the Counsel for Advocacy of the Small Business Administration that this proposed rule would not have a significant economic impact on a substantial number of small entities. An entity's potential burden under this rule would vary based on four factors; whether its submissions require additional documents; its pre-existing hardware and software; whether its documents are already in text searchable PDF format; and, if they are not, whether documents in such format can be created directly from other computer files or whether they must be scanned from paper documents.

Some entities might incur no additional burden because of this rule. These are the entities whose submissions require no accompanying documents, those who are already creating the documents in text searchable PDF format and those who are already creating the documents using software that is capable of producing the same documents in PDF text searchable format. BIS does not have accurate data on the number of entities that fall into this category, but based on a recent sample from its internal database, BIS projects that as many as half of the submissions that it receives do not require any accompanying documents.

Some entities might incur only a software acquisition burden because of this rule. These are the entities whose accompanying documents are already created using software that cannot produce PDF files directly, but that can produce such files with additional software that the entity can purchase. BIS estimates that such an entity with a small operation would incur an initial expense of approximately \$325 to acquire that software necessary to comply with this rule. This estimate is based on the price of Adobe Acrobat® Standard Edition (\$299) as posted on the Adobe Corporation Web site on August 13, 2003 plus any taxes or shipping charges.

Some entities might incur software and hardware acquisition costs and labor costs associated with a submission. These are the entities who will need to scan in paper documents and make them text searchable and who do not presently have either hardware or software capable of performing these functions. In some instances, the entity could utilize software that comes bundled with a scanner to comply with this requirement. In such instances, BIS estimates that the entity would incur an initial cost of approximately \$300 (to purchase the scanner) to comply with this rule. In some cases, particularly if the entity has to scan numerous

complex paper documents and make them text searchable, the costs could be higher. BIS estimates that the initial costs for an entity facing such a situation would be approximately \$1,100. This estimate is based on a price of \$300 for Adobe Acrobat® Standard Edition software, \$400 for Adobe Capture® software, \$300 for a scanner and \$100 for taxes and shipping charges.

Entities who have to scan paper documents may also incur labor costs to proofread and correct mistakes that may occur when a computer converts images to text. BIS estimates that, depending on the complexity of the document, proofreading could take from 5 minutes to 20 minutes per page. In a recent random sampling of submissions recorded in BIS's databases, the number of supporting or explanatory pages associated with an individual submission varied from a low of zero to a high of 33 pages. A typical submission with attachments had about eight pages attached. However, BIS has no way of telling which attachments could be generated electronically and which would require scanning and proofreading. Assuming an average of 8 pages per document and labor costs for proofreading documents at \$25 per hour, this cost would range from \$16.67 to \$100 per submission. BIS believes that this cost would not be incurred by entities that are able to produce the PDF documents from an electronic source because of the accuracy of the process for generating text in PDF files produced from such sources.

Electronic filing would yield some cost savings to offset part or all of these costs. If a submission relates to attachments from an earlier submission, the submitter could refer to the previous file instead of supplying new attached documents. Currently, in many instances, attachments are submitted to BIS by overnight courier. Electronic filing would eliminate these courier costs. In addition, BIS internally uses an electronic system to process all submissions that are subject to this proposed rule, whether it receives the submission on paper or electronically. However, the attachments are all on paper, creating delays as paper documents are moved to the technical personnel in BIS and in other government agencies. Electronic attachments are likely to reduce evaluation time, *i.e.*, the total time from submission to final decision, by several days.

BIS does not collect data on the size of entities that file these submissions. However, based on the information that it does possess, BIS believes that fewer

than 400 small entities are likely to be affected by this rule. BIS arrived at this conclusion by identifying all of the entities that filed four or more submissions during the period from January 1, 2002 to May 13, 2003. A total of 591 entities were identified. BIS determined that 120 of these are not small businesses because they are corporations, or affiliates thereof, that were listed in the Fortune 500 listing of April 14, 2003, or the Fortune Global 500 listing of July 22, 2002, or because the entity's Web site indicated sales in the most recent year in excess of \$100 million. The lowest reported sales figures for 2003 Fortune 500 and the 2002 Fortune Global 500 were \$2.9 billion and \$10 billion, respectively. Of the remaining 471 entities, 44 submitted export license applications totaling more than \$10 million and an additional 21 submitted license applications between \$5 million and \$10 million during the period. Although BIS does not know their sales volumes or employment levels, companies anticipating such levels of export sales are unlikely to be small businesses.

Because many industries may be involved in exporting, BIS could not directly relate its data to the "Small Business Size Standards Matched to North American Industry Classification System" published by the Small Business Administration (SBA). However, BIS notes that the range of annual sales among industries in that publication that could be involved in exporting is from \$0.75 to \$6 million.¹ It is likely that many of the 406 remaining entities would not meet the small business standard established by the SBA. In addition, some of these entities may either file submissions that do not require attachments or already create text searchable PDF files of the documents that must be attached or already create the documents using software that can create PDF files directly. For these entities, the rule creates no new burden.

For two industries that are included in BIS's data, the SBA criteria is number of employees. These two industries are semiconductor manufacturing for which the level is 500 employees and small arms manufacturing, for which the level is 1,000 employees. BIS identified employee levels via the Web sites for several semiconductor manufacturers that appeared in its data. All of these had more than 500 employees. In addition, they all had more than \$100

¹ Several categories of construction contractors had sales cutoff levels ranging up to \$28.5 million. However, such companies are unlikely to engage in activities that require export licenses.

million in annual sales. BIS was unable to identify the employment level for the firearms manufacturers in its data.

However, most BIS firearms export applications are for shotguns that BIS can evaluate based on the applicant's furnishing of the manufacturer's name and the shotgun model number. Such applications typically require no attachments.

Overall the number of small entities affected by this proposed rule is likely to be small. For those that are affected, the savings from re-use of documents for multiple submissions, reduced courier fees and faster processing times are likely to fully or partially compensate for the cost of compliance with this rule.

Request for Comments

BIS is seeking public comments on this proposed rule. The period for submission of comments will close January 12, 2004. BIS will consider all comments received on or before that date in developing a final rule. Comments received after that date will be considered if possible, but their consideration cannot be assured. BIS will not accept public comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. BIS will return such comments and materials to the persons submitting the comments and will not consider them in the development of the final rule. All public comments on this proposed rule must be in writing (including fax or e-mail) and will be a matter of public record, available for public inspection and copying. The Office of Administration, Bureau of Industry and Security, U.S. Department of Commerce, displays these public comments on BIS's Freedom of Information Act (FOIA) Web site at <http://www.bis.doc.gov/foia>. This office does not maintain a separate public inspection facility. If you have technical difficulties accessing this Web site, please call BIS's Office of Administration at (202) 482-0637 for assistance.

List of Subjects

15 CFR Parts 740 and 748

Administrative practice and procedure, Exports, Foreign trade, Reporting and recordkeeping requirements.

15 CFR Parts 742 and 772

Exports, Foreign Trade.

15 CFR Part 754

Exports, Foreign trade, Forests and forest products, Petroleum, Reporting and recordkeeping requirements.

Accordingly, Parts 740, 742, 748, 754, and 772 of the Export Administration Regulations (15 CFR Parts 730-799) are proposed to be amended as follows:

PART 740—[AMENDED]

1. The authority citation for 15 CFR Part 740 is revised read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; Sec. 901-911, Pub. L. 106-387; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 7, 2003, 68 FR 47833, August 11, 2003.

2. Section 740.17 is amended by revising paragraph (d)(1) to read as follows:

§ 740.17 Encryption commodities and software (ENC).

* * * * *

(d) *Review requirement.* (1) *Review request procedures.* To request review of your encryption products under License Exception ENC, you must submit to BIS and to the ENC Encryption Request Coordinator the information described in paragraphs (a) through (e) of Supplement 6 to part 742 of the EAR (Guidelines for Submitting Review Requests for Encryption Items). Review requests must be submitted to BIS via SNAP+ or, if authorized by BIS, on the Form BIS-748P (as described in § 748.3 of the EAR). Any documents related to review requests submitted to BIS via SNAP+ must be in "PDF" format and, if they contain text, must be text searchable. To ensure that your review request is properly routed, insert the phrase "License Exception ENC" in the Special Purpose block or field of the application form and select "Classification Request" from the work item menu in SNAP+ or place an "X" in the box marked "Classification Request" in the Type of Application block on the BIS-748P. Failure to properly complete these items may delay consideration of your review request. Review requests that are not submitted electronically to BIS should be sent to one of the addresses preprinted on the form BIS-748P. See paragraph (e)(5)(ii) of this section for the mailing address for the ENC Encryption Request Coordinator. BIS will notify you if there are any questions concerning your request for review under License Exception ENC (e.g., because of missing or incomplete support documentation). Once your review has been completed, BIS will notify you in writing concerning the eligibility of your

products for export or reexport, under the provisions of this license exception. BIS reserves the right to suspend your eligibility to export and reexport under License Exception ENC and to return your review request without action, if you have not met the review requirements. You may not export or reexport retail encryption commodities, software, or components under this license exception to government end-users headquartered outside of Canada and the countries listed in Supplement 3 to this part 740, unless you have received prior authorization from BIS.

* * * * *

3. In § 740.18, revise paragraph (c)(2) to read as follows:

§ 740.18 Agricultural Commodities AGR.

* * * * *

(c) * * *

(2) *Procedures.* You must submit your License Exception AGR notification via SNAP+ or, if BIS authorizes you to use paper filing pursuant to § 748.1(e) of the EAR, on the BIS-748P form. In SNAP+, AGR notifications must be designated by selecting "Agricultural License Exception Notice" from the SNAP+ work item menu. Any documentation submitted via SNAP+ in connection with the License Exception AGR notification must be submitted as a "PDF" file and must be text searchable if the documentation contains text. Paper notifications must be designated by selecting "Other" in the "Type of Application" block. If any of the required information is missing, BIS will return without action notifications submitted via SNAP+ and will not initiate registrations of paper submissions. If a paper notification is not signed, BIS will not initiate registration. Each notification must include:

(i) The name, telephone number, and facsimile number (if available), of a contact person;

(ii) The name, address (including city, state, postal code and country) of the applicant, the purchaser, any intermediate consignee, the ultimate consignee, and the end-user;

(iii) The Employer Identification Number of the applicant if applicable;

(iv) The specific end-use;

(v) Because only EAR99 items are eligible for this License Exception, enter EAR99 in the ECCN field;

(vi) Quantity, units, unit price, and total price;

(vii) Date of filing if filing on paper, SNAP+ notices are automatically dated;

(viii) A description of the items;

(ix) The total value in U.S. dollars; and

(x) If the item to be exported is fertilizer, Western Red Cedar or live horses, you must include the Commodity Classification Automatic Tracking System (CCATS) number to confirm that BIS has classified the item as EAR99.

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PART 742—[AMENDED]

4. The authority citation for 15 CFR Part 742 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 18 U.S.C. 2510 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; Sec. 901–911, Pub. L. 106–387; Sec. 221, Pub. L. 107–56; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of November 9, 2001, 66 FR 56965, 3 CFR, 2001 Comp., p. 917; Notice of August 7, 2003, 68 FR 47833, August 11, 2003.

5. In § 742.15, revise paragraph (b)(2)(i) to read as follows:

§ 742.15 Encryption items.

* * * * *

(b) * * *

(2) * * *

(i) *Procedures for requesting review.*

To request review of your mass market encryption products, you must submit to BIS and the ENC Encryption Request Coordinator the information described in paragraphs (a) through (e) of Supplement 6 to this part 742, and you must include specific information describing how your products qualify for mass market treatment under the criteria in the Cryptography Note (Note 3) of Category 5, Part 2 (“Information Security”), of the Commerce Control List (Supplement No. 1 to Part 774 of the EAR). Review requests must be submitted via SNAP+, or if authorized by BIS, on the Form BIS–748P, as described in § 748.3 of the EAR. To ensure that your review request is properly routed, insert the phrase “mass market encryption” in the Special Purpose block or field of the application form and select “Classification Request” from the SNAP+ work item menu or place an “X” in the box marked “Classification Request” on the form BIS–748P. Failure to properly complete these items may delay consideration of your review request. Review requests that are not submitted electronically to BIS should be sent to one of the addresses preprinted on the BIS–748P. Submissions to the ENC Encryption Request Coordinator should be directed to the mailing address indicated in § 740.17(e)(5)(ii) of the EAR. BIS will

notify you if there are any questions concerning your request for review (*e.g.*, because of missing or incomplete support documentation).

6. In supplement No. 6 to part 742 revise the introductory paragraph to read as follows:

Supplement No. 6 to Part 742— Guidelines for Submitting Review Requests for Encryption Items

Review requests for encryption items and all accompanying documents must be submitted electronically via BIS’s Simplified Network Application Process (SNAP+) or, if authorized by BIS (see § 748.1(e) of the EAR), on Form BIS–748P (Multipurpose Application) with accompanying paper documentation in accordance with the procedures in § 748.3 of the EAR. Requests must be supported by the documentation described in this Supplement. To ensure that your review request is properly routed, insert the phrase “mass market encryption” or “License Exception ENC” (whichever is applicable) in the “Special Purpose” block or field of the application. Select “Commodity Classification” from the SNAP+ work item menu or, if filing a paper application, place an “X” in the box marked “Classification Request” in the “Type of Application” block. That block does not provide a separate item to check for the submission of encryption review requests. Failure to properly complete these items may delay consideration of your review request. Paper review requests must be sent to one of the addresses pre-printed on the form. In addition, you must send a copy of your review request and all support documents to: Attn: ENC Encryption Request Coordinator, 9800 Savage Road, Suite 6131, Fort Meade, MD 20755–6000. For all review requests of encryption items, you must provide brochures or other documentation or specifications related to the technology, commodity or software, relevant product descriptions, architecture specifications, and as necessary for the review, source code. You also must indicate whether there have been any prior reviews of the product, if such reviews are applicable to the current submission. In addition, you must provide the following information in a cover letter accompanying your review request:

* * * * *

PART 748—[AMENDED]

7. The authority citation for 15 CFR Part 748 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 7, 2003, 68 FR 47833, August 11, 2003.

8. In § 748.1, revise paragraph (a) and add paragraphs (d) and (e) to read as follows:

§ 748.1 General provisions.

(a) *Scope.* In this part, references to the Export Administration Regulations

or EAR are references to 15 CFR chapter VII, subchapter C. The provisions of this part involve requests for classifications and advisory opinions, export license applications, encryption review requests, reexport license applications, and license exception notices subject to the EAR. All terms, conditions, provisions, and instructions, including the applicant and consignee certifications, contained in such form(s) are incorporated as part of the EAR. For the purposes of this part, the term “application” refers to both electronic applications and the Form BIS–748P: Multipurpose Application.

* * * * *

(d) *Electronic Filing Required.* All export license applications, reexport license applications, encryption review requests, license exception AGR notifications, and Classification Requests and their accompanying documents must be filed via BIS’s Simplified Network Application Processing (SNAP+) system unless:

(i) BIS approves the applicant for paper filing under paragraph (e) of this section; or

(ii) The application is for a Special Comprehensive License.

(e) *Paper Filing Authorization.* BIS may grant approval to use the paper forms (Form BIS–748P, Multipurpose Application (revised June 15, 1996 or later), and Form BIS–748P–A, Item Appendix, and Form BIS–748P–B, End-User Appendix) for export license applications, reexport license applications, encryption review requests, license exception AGR notifications, or Classification Requests under the conditions described in this paragraph.

(1) *Reasons for authorizing paper applications.* The party submitting the application must meet one or more of the following criteria:

(i) BIS has received no more than three applications, requests or notices from that party in the twelve months immediately preceding its receipt of the current application notification, or request;

Note to paragraph (e)(1)(i): The party’s export license applications, reexport license applications, encryption review requests, license exception AGR notifications, and Classification Requests will be added together to determine if this limit is met;

(ii) The party does not have access to the Internet;

(iii) BIS has rejected the party’s request or revoked its eligibility to file electronically;

(iv) BIS has requested that the party submit a paper copy for a particular transaction; or

(v) BIS determines that urgent circumstances or circumstances beyond the filer's control require allowing paper filing in a particular instance.

(2) *Procedure for requesting authorization to file paper applications, notifications, or requests.* Include, in the Additional Information block on the BIS-748P Multipurpose Application Form, the criterion(ia) listed in paragraph (e)(1) of this section upon which the request is based. If you are relying upon paragraph (e)(1)(ii) or (v), explain why you lack access to the Internet or why you believe that urgent circumstances or circumstances beyond your control require allowing paper filing in this instance. If you need additional space, attach a plain sheet of paper with the additional explanation to the Form BIS-748P.

(3) *BIS decision.* If BIS authorizes or requires you to file using paper, it will process your application or request in accordance with Part 750 of the EAR. If BIS rejects your request to file using paper, it will return your Form BIS-748P and all attachments to you without action and will state the reason for the rejection.

9. In § 748.2, revise paragraph (c) to read as follows:

§ 748.2 Obtaining forms; mailing addresses.

* * * * *

(c) Paper applications should be mailed or submitted using an overnight courier to one of the addresses preprinted on the application form. BIS will not accept applications sent C.O.D.

10. In § 748.3, revise paragraph (b) introductory text, add a sentence to the end of paragraph (b)(1), and revise paragraphs (b)(2) and (c)(2)(iii) to read as follows:

§ 748.3 Classification requests, advisory opinions, and encryption review requests.

* * * * *

(b) *Classification requests.* You must submit your Classification Request electronically via SNAP+ unless BIS approves your request to use Form BIS-748P pursuant to § 748.1(e) of the EAR. See the instructions contained in supplement No. 1 to Part 748 to complete the fields or blocks identified for this type of request. Classification Requests submitted on Form BIS-748P must be sent to BIS at one of the addresses preprinted on the form. Related documents submitted in connection with these requests must be submitted as "PDF" files if the request is submitted via SNAP+. If the document contains text, the file must be text searchable.

(1) * * * Unless BIS has authorized paper filing pursuant to § 748.1(e) of the

EAR, the documents must be in "PDF" format and, if they contain text, be text searchable.

(2) When submitting a Classification Request, you must provide the name of a contact person, telephone number, facsimile number, if available, and specify that you are seeking a Classification Request in the designated fields or blocks on the electronic form or the BIS-748P. You must provide a recommended classification in the designated field or block and explain the basis for your recommendation based on the technical parameters specified in the appropriate ECCN, if any, in the "additional information" field or block. Describe in the "additional information" field or block, any ambiguities or deficiencies that could affect the accuracy of your recommended classification.

(c) * * *

(2) * * *

(iii) The Export Control Classification Number or, if appropriate, EAR99 for each item; and

* * * * *

11. In § 748.4, revise the third and fourth sentence of paragraph (b)(1), and revise paragraphs (b)(2)(ii) and (g) to read as follows:

§ 748.4 Basic guidance related to applying for a license.

* * * * *

(b) *Disclosure of parties on license applications and the power of attorney.*

(1) *Disclosure of parties.* * * * If there is any doubt about which persons should be named as parties to the transaction, the applicant must disclose the names of all such persons and the functions to be performed by each in the "additional information" field of the electronic application or block of the BIS-748P Multipurpose Application form. Note that when the foreign principal party in interest is the ultimate consignee or end-user, the name and address need not be repeated in the "additional information" field or block. See "Parties to the transaction" in § 748.5 of this part.

(2) * * *

(i) * * *

(ii) *Application.* Agents who are required to obtain a power of attorney or other written authorization under this section must select "Third Party" when registering to use the SNAP+ system. When completing applications, whether electronically or on the BIS-748P Multipurpose Application Form, the agent must select "other" in the "documents on file with applicant" field or block and insert "748.4(b)(2)" in the Additional Information field or block to indicate that the power of

attorney or other written authorization is on file with the agent. See § 758.3(d) of the EAR for power of attorney requirement, and see also part 762 of the EAR for recordkeeping requirements.

* * * * *

(g) *Resubmission.* If a license application is returned without action to you by BIS or your application represents a transaction previously denied by BIS, and you want to resubmit the license application, a new license application must be completed in accordance with the instructions contained in Supplement No. 1 to part 748. Cite the Application Control Number on your original application in the "Resubmission Application Control Number" field or block on the new license application.

* * * * *

12. In § 748.5, revise the introductory paragraph and paragraph (b) to read as follows:

§ 748.5 Parties to the transaction.

The following parties may be entered on the export license application or reexport license application. The definitions, which also appear in part 772 of the EAR, are set out here for your convenience to assist you in filling out your application correctly.

(a) * * *

(b) *Other party authorized to receive license.* The person authorized by the applicant to receive the license. If a person and address are listed in "Other Party Authorized to Receive License" field or block of the SNAP+ data entry screen or the BIS-748P Multipurpose Application Form, the Bureau of Industry and Security will send the license to that person instead of the applicant. Designation of another party to receive the license does not alter the responsibilities of the applicant, licensee or exporter.

* * * * *

13. In § 748.6, revise paragraphs (a), (e), and the last sentence of paragraph (g) to read as follows:

§ 748.6 General instructions for license applications.

(a) *Form and instructions.* An application for a license, whether to export or reexport, must be submitted electronically via the SNAP+ system or, if BIS authorizes paper filing pursuant to § 748.1(e) of the EAR, on Form BIS-748P, Multipurpose Application (revised June 15, 1996 or later), and Form BIS-748P-A, Item Appendix, and Form BIS-748P-B, End-User Appendix. Facsimiles or copies of these forms are not acceptable. Instructions for

preparing the application are in supplement No. 1 to this part 748.

* * * * *

(e) *Assembly and additional information.* Any paper documents or correspondence relating to your paper license applications should bear the Application Control Number, and be stapled together. Any documents related to an application filed in SNAP+ must be "attached" to the application as a "PDF" file. If the document contains text, the PDF file must be text searchable. Where necessary, BIS may require you to submit additional information beyond that stated in the EAR confirming or amplifying information contained in your license application.

* * * * *

(g) *Request for extended license validity period.* * * * To request an extended validity period, include justification for your request in the "additional information" field or block on the application.

14. Revise § 748.7 to read as follows:

§ 748.7 Electronic submission of license applications and other documents.

(a) *Scope.* This section applies to electronic submissions of export and reexport license applications, license exception notifications, encryption review requests, and Classification Requests. All such electronic submissions must be made through the Simplified Network Application Processing (SNAP+) system.

(b) *Registration Procedures.* (1) *Procedures for parties not authorized to use SNAP+ prior to [implementation date of SNAP+].* Parties who were not authorized to use SNAP+ on [implementation date of SNAP+] must begin the application process electronically at [Web site URL to be announced in the final rule] and must supply the information listed in paragraphs (b)(1)(i) through (b)(1)(viii) of this section. To complete the application process, the SNAP+ applicant must print the document that is generated by the on-line registration process on the SNAP+ applicant's letterhead, and the SNAP+ applicant's designated official must sign it and submit it to BIS at the address printed on the document. BIS will notify the SNAP+ applicant via e-mail at the e-mail address of the designated official as entered on the on-line registration form of its decision as to whether the applicant may file applications via SNAP+. The following information must be supplied:

- (i) Name of SNAP+ applicant;
- (ii) Address of SNAP+ applicant;

(iii) The SNAP+ applicant's "organization type," *i.e.*, whether the applicant is an individual or industry (industry means any entity other than an individual);

(iv) The SNAP+ applicant's "industry role", *i.e.*, whether it is an exporter or an agent for a principal party in interest who is required to have a power of attorney or other written authorization by § 748.4(b)(2)(i) of the EAR (such an agent is designated as a "third party" in SNAP+);

(v) The SNAP+ applicant's employer identification number, if the SNAP+ applicant's organization type is "industry" and the SNAP+ applicant is located in the United States;

(vi) The name, telephone number, facsimile number (optional), and e-mail address of the SNAP+ applicant's "designated official;" and

(vii) The name, telephone number, facsimile number (optional), e-mail address, user name and initial password of the SNAP+ applicant's initial organization administrator.

(2) *Procedures for parties authorized to use SNAP prior to [implementation date of SNAP+].* Parties authorized to use SNAP prior to [implementation date of SNAP+] will be notified in writing by BIS of the date on which BIS will convert their accounts to SNAP+, the requirements regarding organization administrators and certifiers described in paragraph (c) of this section, and of the requirement that they log onto the SNAP+ Web site [URL to be included in the final rule] and provide the information described in subparagraphs (b)(1)(vi) and (b)(1)(vii) of this section.

(c) *Parties to the SNAP+ system, their roles and responsibilities.* The roles and responsibilities in this section are in addition to any other roles or responsibilities imposed elsewhere in the EAR or other applicable law.

(1) *SNAP+ applicant.* The SNAP+ applicant is the entity or individual that applies to use SNAP+ to submit documents to BIS.

(2) *SNAP+ user.* The SNAP+ user is the entity or individual that has been authorized to submit documents to BIS via SNAP+. SNAP+ users who are registered as "Third Parties" to submit on behalf of other entities and SNAP+ users who wish to submit on behalf of their subsidiaries must register the name and address information of those other entities or subsidiaries on the designated entry screens in SNAP+ prior to submitting any documents on their behalf.

(3) *Designated official.* The designated official is the individual who makes, on behalf of the SNAP+ applicant, the application to use the SNAP+ system.

(4) *Organization administrator.* Organization administrator(s) are individuals who can enable other individuals to use the SNAP+ system, terminate an individual's access to the SNAP+ system, and who can assign or change the roles of those individuals, all on the SNAP+ user's behalf. The roles which an organization administrator may assign to an individual are organization administrator (who has all of the authorities in the SNAP+ system that the initial organization administrator has), certifier, stager and viewer.

(5) *Certifier.* Certifiers are individuals who can submit to BIS, on behalf of the SNAP+ user, any type of application, form, report, document or other information that may be submitted via the SNAP+ system at the time of the submission, even if it was not available at the time that he/she became a certifier, and make representations to BIS on the SNAP+ user's behalf as to the truth, accuracy and completeness of the application, form, report, document or other information submitted.

(i) BIS will treat submissions made in the SNAP+ system by any of the SNAP+ user's certifiers as representations by the SNAP+ user to the United States Government until the certifier's role is terminated in the SNAP+ system by one of the SNAP+ user's organization administrators or by BIS.

(ii) Although BIS reserves the right to remove any individual or SNAP+ user from the SNAP+ system at its sole discretion, it is the responsibility of the SNAP+ user's organization administrator, and not BIS, to remove a certifier from SNAP+ or remove the role of certifier from an individual who ceases to be authorized by the SNAP+ user to certify submissions to BIS on the SNAP+ user's behalf.

(6) *Stager.* A stager can enter information and documents into the SNAP+ system on behalf of the SNAP+ user for submission to BIS by a certifier.

(7) *Viewer.* A viewer can view information and documents in the SNAP+ system, but may not enter any information or attach any documents to a submission.

(8) *Agents.* An agent (regardless of whether it is required to have a power of attorney or other written authorization or whether its authority derives from a relationship described in § 748.4(b)(2)(i) of the EAR) who submits via SNAP+ for another party must notify BIS immediately if his authority to do so is terminated. Such notification must be in writing and sent to:

Office of Exporter Services, P.O. Box 273,
Washington, DC 20044, Attention: SNAP+.

(d) *Continuing requirements.* The requirements of this paragraph relate to electronic filing authorizations issued prior to [implementation date of SNAP+] and continue in effect after that date.

(i) No person may use, copy, steal or otherwise compromise a PIN assigned to another person; and no person may use, copy, steal or otherwise compromise the company identification number where the company has not authorized such person to have access to the number.

(ii) Companies authorized to file electronically prior to [insert effective date of SNAP+] must maintain a log of submissions made under SNAP prior to that party being converted to SNAP+. The log may be maintained either manually or electronically, specifying the date and time of each electronic submission, the ECCNs of items included in each electronic submission, and the name of the employee or agent submitting the license application. This log may not be altered. Written corrections must be made in a manner that does not erase or cover original entries. If the log is maintained electronically, corrections may only be made as notations. This log must be maintained in accordance with the requirements of part 762 of the EAR.

(e) *Continuation of requirements for existing electronic filers prior to conversion to SNAP+.* Entities and individuals authorized to file electronically prior to [implementation date of SNAP+] must continue to comply with procedures described in this paragraph until their accounts are converted to SNAP+.

(i) *Use of company identification numbers.* The company may reveal the company identification number assigned to it by BIS only to the personal identification number (PIN) holders, their supervisors, employees, or agents of the company with a commercial justification for knowing the company identification number.

(ii) *Use of personal identification numbers.* An individual who has been assigned a personal identification number (PIN) system may not:

(A) Disclose the PIN to anyone;

(B) Record the PIN either in writing or electronically;

(C) Authorize another person to use the PIN; or

(D) Use the PIN following termination by BIS or the SNAP user company of his or her authorization to do so.

(iii) *Other continuing requirements.*

(A) If a PIN is lost, stolen or otherwise compromised, the company and the PIN holder must report the loss, theft or compromise of the PIN immediately by telephoning BIS at (202) 482-0436. You

must confirm this notification in writing within two business days to BIS at the address provided in paragraph (c)(8) of this section.

(B) A company authorized to file electronically must immediately notify BIS whenever a PIN holder leaves the employ of the company or otherwise ceases to be authorized by the company to submit applications electronically on its behalf.

(C) A company authorized to file electronically must notify BIS of any change in its name or address.

15. In § 748.9, revise paragraph (c) introductory text to read as follows:

§ 748.9 Support documents for license applications.

* * * * *

(c) *License applications requiring support documents.* License applications requiring support by either a Statement by the Ultimate Consignee and Purchaser or an Import or End-User Certificate must indicate the type of support document obtained by placing an "X" in the appropriate box either in the designated field on the electronic form or, if filing a paper application, in the "Documents Submitted with Application" or the "Documents on File with Applicant" block. If the support document is an Import or End-User Certificate, you must also identify the originating country and number of the certificate in the designated block or field on your application. License applications submitted without so designating the document type, country, and document number will be returned without action unless satisfactory reasons for failing to obtain the document are supplied in the additional information block or field or in an attachment.

* * * * *

16. In § 748.10, revise paragraphs (f) and (g) to read as follows:

§ 748.10 Import and End-user Certificates.

* * * * *

(f) *Multiple license applications supported by one certificate.* An Import or End-User Certificate may cover more than one purchase order and more than one item. Where the certificate includes items for which more than one license application will be submitted, you must include in the Additional Information field or block on your application, or in an attachment to each license application submitted against the certificate, the following certification:

I (We) certify that the quantities of items shown on this license application, based on the Certificate identified in the Import/End-User Certificate Country and Number fields or blocks of this license application, when

added to the quantities shown on all other license applications submitted to BIS based on the same Certificate, do not total more than the total quantities shown on the above cited Certificate.

(g) *Submission of Import and End-User Certificates.* Applications for which a PRC End-User Certificate is required that are filed via SNAP+ must have a complete, accurate image of the original certificate attached electronically with the SNAP+ submission and the applicant must retain the original certificate for the time period specified in § 762.6 of the EAR. Applications for which a PRC End-User Certificate is required that are filed on paper must be accompanied by the original certificate. All other certificates must be retained on file in accordance with the recordkeeping provisions of the part 762 of the EAR and not submitted with the license application.

* * * * *

17. In § 748.11 revise the first sentence of paragraph (a)(2) to read as follows:

§ 748.11 Statement by Ultimate Consignee and Purchaser.

(a) * * *

(2) The applicant is the same person as the ultimate consignee, provided the required statements are contained in the "Additional Information" field or block on the license application. * * *

* * * * *

18. In § 748.12, revise paragraph (d)(1) to read as follows:

§ 748.12 Special provisions for support documents.

* * * * *

(d) *Procedures for requesting an exception.* (1) Requests for an exception must be submitted with the license application to which the request relates. Requests relating to more than one license application should be submitted with the first license application and referred to in the "Additional Information" field or block on any subsequent license application. The request for an exception must be on the applicant's letterhead and may be attached electronically to an application filed via SNAP+ or submitted as a paper attachment to an application filed on paper.

* * * * *

19. In § 748.14 revise the section heading, the third, fourth and fifth sentences of paragraph (b) introductory text, and revise paragraph (e) to read as follows:

§ 748.14 Import Certificate for firearms destined for Organization of American States (OAS) member countries.

(b) Import Certificate Procedure.

* * * All the recordkeeping provisions of part 762 of the EAR apply to this requirement. The applicant must clearly note the number and date of the Import Certificate or equivalent official document on all export license applications supported by that Certificate or equivalent official document. The applicant must also indicate in the "Documents on File with Applicant" field or block of the application that the Certificate or equivalent official document has been received and will be retained on file.

* * *

* * * * *

(e) Use of Import Certificate. An Import Certificate or equivalent official document may be used to support only one license application. The application must include the same items as those listed on the Import Certificate or equivalent official document.

* * * * *

20. Revise supplement No. 1 to part 748 to read as follows:

Supplement No. 1 to Part 748—SNAP+, BIS-748p, BIS-748p-a: Item Appendix, and BIS-748p-b: End-User Appendix; Information Requirements

All information must be entered in the designated fields in SNAP+ or, if you are submitting a paper application, legibly typed within the lines for each block or box, on the BIS-748P, BIS-748P-A, or BIS-748P-B forms except where a signature is required on the paper forms. On the paper forms, enter only one typed line of text per block or line. Except as noted below, you must supply the following information with export and reexport license applications, classification requests, License Exception AGR notices, and encryption review requests.

Contact Person. This should be a person who can answer questions concerning the application, request or notice. In SNAP+, the contact person must be a person who has been authorized access to the SNAP+ system on behalf of the applicant as a viewer, stager, certifier or organization administrator. On paper applications, enter the name of the contact person.

Telephone. In SNAP+, this information was entered when the contact person was given access to the system and need not be reentered with each application. For paper submissions, enter the telephone number of the contact person.

Facsimile. In SNAP+, this information was entered when the contact person was given access to the system and need not be reentered with each application. For paper submissions, enter the facsimile number, if available, of the person who can answer questions concerning the application.

Date of Application. In SNAP+, the computer automatically records the date of

submission. For paper applications enter the current date.

Type of Submission. If you are filing via SNAP+, select the type of submission from the work item menu as follows:

For items in the United States that you wish to export or for technology or software (source code) that you wish to reveal to foreign nationals in the United States, select "Export." See § 734.2(b)(9) for the definition of "export" that applies to encryption source code and object code software subject to the EAR.

For items located outside the United States that you wish to move from one foreign country to another foreign country, or for technology or software (source code) that you wish to reveal to foreign nationals in a foreign country, select "Reexport."

If you are requesting BIS to classify your item against the Commerce Control List (CCL), select "Commodity Classification."

For License Exception AGR notifications, select "License Exception AGR."

For Encryption Review requests select "Commodity Classification" and then select the check box labeled "Encryption Item."

Note: You may not use SNAP+ to file Special Comprehensive License applications.

If you are filing a paper form BIS-748P, place an "X" in the appropriate box in the "Type of Application" block as follows:

For items located within the United States that you wish to export or for technology or software (source code) that you wish to reveal to foreign nationals in the United States mark the box labeled "Export" with an "X."

For items located outside the United States that you wish to move from one foreign country to another foreign country, or for technology or software (source code) that you wish to reveal to foreign nationals in a foreign country, mark the box labeled "Reexport" with an "X."

If you are requesting BIS to classify your item against the Commerce Control List (CCL), place an "X" in the box labeled "Classification Request."

If you are submitting a Special Comprehensive License application in accordance with the procedures described in part 752 of the EAR, place an "X" in the box labeled "Special Comprehensive License."

If you are submitting a License Exception AGR notification, place an "X" in the box labeled "Other."

If you are submitting an encryption review request place an "X" in the box labeled "Commodity Classification."

Documents submitted with Application. Review the documentation you are required to submit with your application in accordance with the provisions of part 748 of the EAR, and mark all applicable boxes with an "X".

Mark the box labeled "Foreign Availability" with an "X" if you are submitting an assertion of foreign availability with your license application. See part 768 of the EAR for instructions on foreign availability submissions.

Mark the box labeled "Tech. Specs" with an "X" if you are submitting descriptive literature, brochures, technical specifications, etc. with your application.

Documents on File with Applicant. Certify that you have retained on file all applicable documents as required by the provisions of part 748 by placing an "X" in the appropriate box(es).

Special Comprehensive License. You may not use SNAP+ if you are applying for a Special Comprehensive License. On the BIS-748P, complete this block only if you are submitting an application for a Special Comprehensive License in accordance with part 752 of the EAR.

Special Purpose. If Supplement No. 2 to this part requires that you enter certain information about your items or transaction in this field or block, enter that information. If you are submitting an encryption review request for License Exception ENC (§ 740.17 of the EAR) enter "License Exception ENC." If you are submitting an encryption review request under the mass market provisions (§ 742.15(b)(2) of the EAR), enter "mass market encryption." If you are submitting an encryption review request for any other reason, enter "encryption—other."

Resubmission Application Control Number. If your original application or License Exception AGR notice was denied or returned without action (RWA), provide the Application Control Number of the original application. This requirement does not apply to paper applications that were returned to you without being registered. You do not need to supply this information for Classification Requests or Encryption Review Requests.

Replacement License Number. If you have received a license for identical items to the same ultimate consignee, but would like to make a modification that is not excepted in § 750.7(c) of the EAR to the license as originally approved, enter the original license number. Include a statement in the additional information field or block regarding what changes you wish to make to the original license. You do not need to supply this information for Classification Requests or encryption review requests.

Items Previously Exported. This information need be completed only for reexport license applications. Enter the license number, License Exception symbol (for exports under General Licenses, enter the appropriate General License symbol), or other authorization under which the items were originally exported, if known, in the "Items Previously Exported" field or block on the BIS-748P form.

Import/End-User Certificate. Enter the name of the country and number of the Import or End User Certificate obtained in accordance with the provisions of this part. You do not need to supply this information for Classification Requests or Encryption Review Requests.

Applicant. In SNAP+, the following information about the applicant must be entered at the time of registration. On BIS-748P forms, it must be entered with each submission. Enter the applicant's name, street address, city, state/country, postal code, and, on applications for export licenses, the applicant's Employer Identification Number unless the applicant is an individual or is an agent who is required to obtain written authorization under

§ 748.4(b)(2) of the EAR to file on behalf of the applicant. Regardless of the method of filing, provide a complete street address. P.O. boxes are not acceptable. Refer to § 748.5(a) of this part for a definition of "applicant." The Employer Identification Number is assigned by the Internal Revenue Service for tax identification purposes. Accordingly, you should consult your company's financial officer or accounting division to obtain this number.

Other Party Authorized to Receive License. If you would like BIS to transmit the approved license to another party designated by you, select "Other Party Authorized to Receive License" from the parties menu in SNAP+, or if filing on paper, fill in all information in the corresponding block. Complete all information, including name, street address, city, country, postal code and telephone number. Leave this space blank if the license is to be sent to the applicant. Designation of another party to receive the license does not alter the responsibilities of the applicant.

Purchaser. If the purchaser is not also the ultimate consignee, enter the purchaser's complete name, street address, city, country, postal code, and telephone or facsimile number. Refer to § 748.5(c) of this part for a definition of "purchaser." You must provide this information even if the purchaser is also the ultimate consignee. You do not need to supply this information for Classification Requests or Encryption Review Requests.

Intermediate Consignee. Enter the intermediate consignee's complete name, street address, city, country, postal code, and telephone or facsimile number. Provide a complete street address; P.O. boxes are not acceptable. Refer to § 748.5(d) of this part for a definition of "intermediate consignee". If your proposed transaction does not involve use of an intermediate consignee, enter "None". If your proposed transaction involves more than one intermediate consignee, provide the same information in the additional information field or block for each additional intermediate consignee. You must provide this information even if the intermediate consignee is the purchaser. You do not need to supply this information for Classification Requests or Encryption Review Requests.

Ultimate Consignee. This information must be supplied if you are submitting an export license application. Enter the ultimate consignee's complete name, street address, city, country, postal code, and telephone or facsimile number. Provide a complete street address; P.O. boxes are not acceptable. The ultimate consignee is the principal party in interest who receives the exported or reexported items. Refer to § 748.5(e) of this part for a definition of "ultimate consignee." A bank, freight forwarder, forwarding agent, or other intermediary may not be identified as the ultimate consignee unless it will receive the item for its own use. Government purchasing organizations are the sole exception to this requirement. A government purchasing organization may be identified as the ultimate consignee if the actual end user(s) is (are) an entity(ies) of the same government and the actual end-user and end-use are clearly identified in the "specific end

use" field or block or in the additional documentation attached to the application.

If your application is for the reexport of items previously exported, enter the new ultimate consignee's complete name, street address, city, country, postal code, and telephone or facsimile number. Provide a complete street address; P.O. boxes are not acceptable. If your application involves a temporary export or reexport, the applicant should be shown as the ultimate consignee in care of a person or entity who will have control over the items abroad.

You do not need to supply this information for Classification Requests or Encryption Review Requests.

End-User. Enter this information only if the ultimate consignee you have identified is not the actual end-user. If there will be more than one end-user, select "end-user" from the parties menu in SNAP+, or if filing a paper application, use Form BIS-748P-B to identify each additional end-user. Enter each end-user's complete name, street address, city, country, postal code, and telephone or facsimile number. Provide a complete street address; P.O. boxes are not acceptable. You do not need to supply this information for Classification Requests or Encryption Review Requests.

Original Ultimate Consignee. If your application involves the reexport of items previously exported, enter the original ultimate consignee's complete name, street address, city, country, postal code, and telephone or facsimile number. Provide a complete street address; P.O. boxes are not acceptable. The original ultimate consignee is the entity identified in the original application for export as the ultimate consignee or the party currently in possession of the items. You do not need to supply this information for Classification Requests or Encryption Review Requests.

Specific End-Use. This information must be completed if you are submitting a license application. Provide a complete and detailed description of the end-use intended by the ultimate consignee and/or end-user(s). If you are requesting approval of a reexport, provide a complete and detailed description of the end-use intended by the new ultimate consignee or end-user(s) and indicate any other countries for which resale or reexport is requested. If additional space is necessary, use the "additional information" block on Form BIS-748P-A or B. Be specific. Such general descriptions such as "research", "manufacturing", or "scientific uses" are not acceptable. You do not need to supply this information for Classification Requests or Encryption Review Requests.

ECCN or EAR99. Enter the Export Control Classification Number (ECCN) that corresponds to the item you wish to export or reexport or, if appropriate, EAR99. If you are submitting a Classification Request, provide a recommended classification for the item.

CTP. You must furnish this information only if your application involves a digital computer or equipment containing a digital computer as described in Supplement No. 2 to this part. Instructions on calculating the CTP are contained in a Technical Note at the end of Category 4 in the CCL.

Model Number. Enter the correct model number for the item.

CCATS Number. If you have received a classification for this item from BIS, provide the CCATS number shown on the classification issued by BIS.

Quantity. Identify the quantity to be exported or reexported, in terms of the "Unit" described in the "Units" paragraph of the ECCN entry. If the "Unit" for an item is "\$ value", enter the quantity in units commonly used in the trade. You do not need to supply this information for Classification Requests or Encryption Review Requests.

Units. The "Unit" paragraph within each ECCN will list a specific "Unit" for those items controlled by the entry. If an item is licensed in terms of "\$ value", the unit of quantity commonly used in trade must also be shown. On license applications for items on the CCL, the unit must be supplied unless the "Unit" for the applicable ECCN reads "N/A" on the CCL. For License Exception AGR notifications use the unit of quantity commonly used in the trade. You do not need to supply this information for Classification Requests or Encryption Review Requests.

Unit Price. Provide the fair market value of the items you wish to export or reexport. Round all prices to the nearest whole dollar amount. Give the exact unit price only if the value is less than \$0.50. If normal trade practices make it impractical to establish a firm contract price, state in the "Additional Information" field or block, the precise terms upon which the price is to be ascertained and from which the contract price may be objectively determined. You do not need to supply this information for Classification Requests or Encryption Review Requests.

Total Price. Provide the total price of the item(s) listed on the application or notification. You do not need to supply this information for Classification Requests or Encryption Review Requests.

Manufacturer. Provide the name only of the manufacturer, if known, for each of the items you wish to export, reexport, or have BIS classify, if different from the applicant.

Technical Description. Provide a description of the item(s) you wish to export, reexport, or have BIS classify. Provide details when necessary to identify the specific item(s); include all characteristics or parameters shown in any applicable ECCN using measurements identified in the ECCN (e.g., basic ingredients, composition, electrical parameters, size, gauge, grade, horsepower, etc.). These characteristics must be identified for the items in the proposed transaction when they are different from the characteristics described in promotional brochure(s).

Total Application Dollar Value. Enter the total value of all items contained on the application in U.S. Dollars. The use of other currencies is not acceptable.

Additional Information. Enter additional data pertinent to the application as required in the EAR. Include special certifications, names of parties of interest not disclosed elsewhere, explanation of documents attached, or any other additional information that you want BIS to consider in the

submission. Before entering information in this field or block, make sure that it is not required to be entered in one of the specific fields or blocks listed in this supplement.

If you are submitting a Classification Request, use this field or block to explain why you believe the recommended ECCN that you entered in the ECCN field or block is appropriate. This explanation must contain an analysis of the item in terms of the technical control parameters specified in the appropriate ECCN, if any. Describe any ambiguities or deficiencies that could affect the accuracy of your recommended classification.

If additional space is necessary, submit an "attachment" to your SNAP+ submission or, if filing on paper, use the "Additional Information" block on the Form BIS-748P-A or B.

Signature. In SNAP+, electronically submitting an application, request, or notification operates as a signature. Paper forms must be manually signed in the designated block by the applicant or its duly authorized agent. The name and title of the person signing must be entered in the designated blocks. Rubber-stamped or electronic signatures are not acceptable. If the person signing is acting on behalf of an agent who is required under § 748.4(b)(2) of the EAR to have written authorization from the applicant, enter the agent's name in the "additional information" block.

21. In supplement No. 2 to part 748:

- a. Revise the introductory text;
- b. Revise paragraphs (a) introductory text and (b);
- c. Revise the second sentence of paragraph (c);
- d. Add paragraph (c)(3);
- e. Revise paragraphs (c)(1) and (2) introductory text and (2)(i);
- f. Revise paragraphs (d)(1) through (6);
- g. Revise paragraphs (e)(1) and (2);
- h. Revise paragraph (f);
- i. Revise paragraph (g)(2);
- j. Revise paragraphs (i)(1) and (2);
- k. Revise paragraphs (j)(1)(i) and (ii), (2)(i) and (ii), and (3)(i) and (ii);
- l. Revise the second sentence of paragraph (l);
- m. Revise paragraphs (m) introductory text, (o)(1), and (p); and
- n. Revise the first sentence of paragraph (r).

The additions and revisions read as follows:

Supplement No. 2 to Part 748—Unique License Application Requirements

In addition to the instructions contained in Supplement No. 1 to part 748, you must also ensure that the additional requirements for certain items or types of transactions described in this supplement are addressed in your license application. All other fields or blocks not specifically identified in this supplement must be completed in accordance with the instructions contained in Supplement No. 1 to part 748. The term field relates to a data entry field on the SNAP+ entry screens, unless otherwise

noted. The term "block" used in this supplement relates to Forms BIS-748P, BIS-748-A, and BIS-748-B.

(a) *Chemicals, medicinals, and pharmaceuticals.* If you are submitting a license application for the export or reexport of chemicals, medicinals, and/or pharmaceuticals, the following information must be provided in the Technical Description field or block.

* * * * *

(b) *Communications intercepting devices.*

If you are required to submit a license application under § 742.13 of this part, you must enter the words "Communications Intercepting Device(s)" in the "Special Purpose" field or block. The item you are requesting to export or reexport must be specified by name in the "Technical Description" field or block.

(c) *Digital computers, telecommunications, and related equipment.* * * * License applications involving computers controlled by Category 4 must identify a Composite Theoretical Performance (CTP) in the "CTP" field or block. * * *

(1) Requirements for license applications involving "digital computers." If you are submitting a license application to export or reexport "digital computers" or equipment containing "digital computers" to destinations in Country Group D:1 (See Supplement No. 1 to part 740 of the EAR), or to upgrade existing "digital computer" installations in those countries, you must include in addition to the CTP in the "CTP" field or block the following information:

- (i) * * *
- (ii) * * *

(2) Additional requirements. License applications to export or reexport computers or related equipment must include:

(i) A signed statement or, when filing via SNAP+, a facsimile thereof by a responsible representative of the end-user or the importing agency describing the end-use and certifying that the "digital computers" or related equipment:

- (A) * * *
- (B) * * *
- (ii) * * *
- (iii) * * *

(3) Recordkeeping. Applicants who submit facsimile statements to meet the requirements of paragraph (c)(2)(i) of this Supplement 2, must maintain the signed original for the period specified in § 762.6 of the EAR.

(d) *Gift parcels; consolidated in a single shipment.* * * *

(1) In the "Purchaser" field or block, enter the word "None";

(2) In the "Ultimate Consignee" field or block, enter the word "Various" instead of the name and address of a single ultimate consignee;

(3) In "Specific End-Use" field or block, enter the phrase "For personal use by recipients";

(4) In the "Quantity" field or block, indicate a reasonable estimate of the number of parcels to be shipped during the validity of the license;

(5) In "Technical Description" field or block, enter the phrase "Gift Parcels"; and

(6) In "Total Application Value" field or block, indicate a reasonable value

approximation proportionate to the quantity of gift parcels identified in the "Quantity" field or block.

(e) *Intransit through the United States.*

* * *

(1) In the "Special Purpose" field or block, enter the phrase "Intransit Shipment";

(2) In the "Additional Information" field or block, enter the name and address of the foreign consignor who shipped the items to the United States and state the origin of the shipment;

* * * * *

(f) *Intransit outside of the United States.* If you are submitting a license application based on General Prohibition No. 8 stated in § 736.2(b)(8) of the EAR and identification of the intermediate consignee in the country of unloading or transit is unknown at the time the license application is submitted, the country of unloading or transit must be shown in the "Intermediate Consignee" field or block.

(g) *Nuclear Nonproliferation items and end-uses.*

* * * * *

(2) *License application requirements.*

Along with the required certification, you must include the following information in your license application:

(i) In the "Documents on File with Applicant" field or block, place an "X" in the box titled "Nuclear Certification";

(ii) In the "Special Purpose" field or block, enter the phrase "NUCLEAR CONTROLS";

(iii) In "Specific End-Use" field or block, provide, if known, the specific geographic locations of any installations, establishments, or sites at which the items will be used;

(iv) In the "Technical Description" field or block, if applicable, include a description of any specific features of design or specific modifications that make the item capable of nuclear explosive activities, or of safeguarded or unsafeguarded nuclear activities as described in § 744.2(a)(3) of the EAR; and

(v) In the "Additional Information" field or block, if your license application is being submitted because you know that your transaction involves a nuclear end-use described in § 744.2 of the EAR, you must fully explain the basis for your knowledge that the items are intended for the purpose(s) described in § 744.2 of the EAR. Indicate the specific end-use(s) the items will have in designing, developing, fabricating, or testing nuclear weapons or nuclear explosive devices or in designing, constructing, fabricating, or operating the facilities described in § 744.2(a)(3) of the EAR.

* * * * *

(i) *Parts, components, and materials incorporated abroad into foreign-made products.* * * *

(1) *License applications for the export of parts and components.* If you are submitting a license application for the export of parts, components, or materials to be incorporated abroad into products that will then be sent to designated third countries, you must enter in the "Specific End-Use" field or block, a description of end-use including a general description of the commodities to be manufactured, their typical end-use, and the countries where those commodities will be

marketed. The countries may be listed specifically or may be identified by Country Groups, geographic areas, etc.

(2) *License applications for the reexport of incorporated parts and components.* If you are submitting a license application for the reexport of parts, components, or materials incorporated abroad into products that will be sent to designated third countries you must include the following information in your license application:

(i) In the "Special Purpose" field or block, enter the phrase "Parts and Components";

(ii) In the "Ultimate Consignee" field or block, enter the name, street address, city and country of the foreign party who will be receiving the foreign-made product. If you are requesting approval for multiple countries or consignees enter "Various" in the "Ultimate Consignee" field or block and list the specific countries, Country Groups, or geographic areas in the "Additional Information" field or block;

(iii) In the "Original Ultimate Consignee" field or block, enter the name, street address, city, and country of the foreign party who will be exporting the foreign-made product incorporating U.S. origin parts, components or materials;

(iv) In the "Specific End-Use" field or block, describe the activity of the end-user identified in the "End-User" field or block or, if the ultimate consignee is also the end user, of the ultimate consignee identified in the "Ultimate Consignee" field or block, and the end-use of the foreign-made product. Indicate the final configuration if the product is intended to be incorporated in a larger system. If the end-use is unknown, state "unknown" and describe the general activities of the end-user;

(v) In the "Quantity" field or block, specify the quantity for each foreign-made product. If this information is unknown, enter "Unknown" in the Quantity field or block;

(vi) In the "Total Price" field or block, enter the digit "0" for each foreign-made product;

(vii) In the "Technical Description" field or block, describe the foreign-made product that will be exported, specifying type and model or part number. Attach brochures or specifications, if available. Show as part of the description the unit value, in U.S. dollars, of the foreign-made product (if more than one foreign-made product is listed on the license application, specify the unit value for each type/model/part number). Also include a description of the U.S. content (including the applicable Export Control Classification Number(s)) and its value in U.S. dollars. If more than one foreign-made product is identified on the license application, describe the U.S. content and specify the U.S. content value for each foreign-made product. Also, provide sufficient support information to explain the basis for the stated values. To the extent possible, explain how much of the value of the foreign-made product represents foreign origin parts, components, or materials, as opposed to labor, overhead, etc. When the U.S. content varies and cannot be specified in advance, provide a range of percentage and value that would indicate the minimum and maximum U.S. content;

(viii) Include separately in the "Technical Description" field or block a description of any U.S. origin spare parts to be reexported with the foreign-made product, if they exceed the amount allowed by § 740.10 of the EAR. Enter the quantity, if appropriate, in the "Quantity" field or block. Enter the ECCN for the spare parts in the "ECCN" field or block and enter the value of the spare parts in the "Total Price" field or block;

(ix) In the "Total Application Dollar Value" field or block, enter the digit "0";

(x) If the foreign-made product is the direct product of U.S. origin technology that was exported or reexported subject to written assurance, a request for waiver of that assurance, if necessary, may be made in the "Additional Information" field or block. If U.S. origin technology will accompany a shipment to a country listed in Country Group D:1 or E:2 (see Supplement No. 1 to part 740 of the EAR) describe in Additional Information field or block the type of technology and how it will be used.

(j) *Ship stores, plane stores, supplies, and equipment.*

(1) * * *

(i) In the "Ultimate Consignee" field or block, enter the name, street address, city, and country of the shipyard where the vessel is being constructed;

(ii) In "Technical Description" field or block, state the length of the vessel for a vessel under 12 m (40 ft) in length. For a vessel 12 m (40 ft) in length or over, provide the following information (if this information is unknown, enter "unknown" in this field or block): * * *

(2) * * *

(i) In the "Ultimate Consignee" field or block, enter the name and address of the plant where the aircraft is being constructed;

(ii) In the "Technical Description" field or block, enter the following information (if this information is unknown, enter "unknown" in this field or block): * * *

(3) * * *

(i) In the "Ultimate Consignee" field or block, enter the name of the owner, the name of the vessel, if applicable, and port or point where the items will be taken aboard;

(ii) In the "Ultimate Consignee" field or block enter the following statement if, at the time of filing the license application, it is uncertain where the vessel or aircraft will take on the items, but it is known that the items will not be shipped to a country listed in Country Group D:1 or E:2 (see Supplement No. 1 to part 740 of the EAR):

* * * * *

(l) *Reexports.* * * * The license application must specify the country to which the reexport will be made in the "Additional Information" field or block.
* * *

(m) *Robots.* If you are submitting a license application for the export or reexport of items controlled by ECCNs 2B007 or 2D001 (including robots, robot controllers, end-effectors, or related software) the following information must be provided in the "Additional Information" field or block:
* * * * *

(o) *Technology—(1) License application instruction.* If you are submitting a license application for the export or reexport of

technology you must check the box labeled "Letter of Explanation" in the "Documents Submitted with the Application" block on the BIS-748P or select "Letter of Explanation" from the pull down menu in the "Document Type" field when attaching an electronic copy of a document to the SNAP+ form, enter the word "Technology" in the "Special Purpose" field or block, leave the "Quantity" and "Manufacturer" fields or blocks blank, and include a general statement that specifies the technology (e.g., blueprints, manuals, etc.) in the "Technical Description" field or block.
* * * * *

(p) *Temporary exports or reexports.* If you are submitting a license application for the temporary export or reexport of an item (not eligible for the *temporary exports and reexports* provisions of License Exception TMP (see § 740.9(a) of the EAR) you must include the following certification in the Additional Information field or block:

The items described on this license application are to be temporarily exported (or reexported) for (state the purpose, e.g., demonstration, testing, exhibition, etc.), used solely for the purpose authorized, and returned to the United States (or originating country) as soon as the temporary purpose has ended, but in no case later than one year of the date of export (or reexport), unless other disposition has been authorized in writing by the Bureau of Industry and Security.
* * * * *

(r) *Encryption review requests.* Enter in the Special Purpose field or block, "License Exception ENC" if you are submitting an encryption review request for license exception ENC (§ 740.17 of the EAR) or "mass market encryption" if you are submitting an encryption review request under the mass market encryption provisions (§ 742.15(b)(2) of the EAR). * * *

PART 754—[AMENDED]

22. The authority citation for 15 CFR part 754 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 30 U.S.C. 185(s), 185(u); 42 U.S.C. 6212; 43 U.S.C. 1354; 46 U.S.C. app. 466c; E.O. 11912, 41 FR 15825, 3 CFR, 1976 Comp., p. 114; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 7, 2003, 68 FR 47833, August 11, 2003.

23. In § 754.2, revise paragraph (g)(1) to read as follows:

§ 754.2 Crude Oil.

* * * * *

(g) *Exports of certain California crude oil.*

* * * * *

(1) Applicants must submit their applications electronically via BIS's Simplified Network Application Process (SNAP+) system unless BIS has authorized the applicant to use the paper Form BIS-748P (See § 748.1(e) of the EAR). Paper applications must be

sent to: Office of Exporter Services, ATTN: Short Supply Program—Petroleum, Bureau of Industry and Security, U.S. Department of Commerce, P.O. Box 273, Washington, DC 20044.

* * * * *

24. In § 754.4, revise paragraphs (d)(1), (d)(2), and (d)(3) to read as follows:

§ 754.4 Unprocessed Western Red Cedar.

* * * * *

(d) *License Applications.* (1) Applicants requesting to export unprocessed western red cedar must submit a properly completed application electronically via SNAP+ unless BIS has authorized the applicant to use the paper form BIS-748P, Multipurpose Application Form (see § 748.1(e) of the EAR). An application to export unprocessed western red cedar must include such other documents as may be required by BIS, and the following statement, either in the “Additional Information” field or block of the application or as a separate signed statement from an authorized representative of the exporter (if submitted in the “Additional Information” field of the application, a separate signature is not required):

I, (Name) (Title) of (Exporter) HEREBY CERTIFY that to the best of my knowledge and belief the (Quantity) (cubic meters or board feed scribner) of unprocessed western red cedar timber that (Exporter) proposes to export was not harvested from State or Federal lands under contracts entered into after October 1, 1979.

(Signature)

(Date)

(2) “Various” may be entered in the “Purchaser” and “Ultimate Consignee” fields or blocks on the applications when there is more than one purchaser or ultimate consignee.

(3) For each application submitted, and for each export shipment made under a license, the exporter must assemble and retain for the period described in part 762 of the EAR, and produce or make available for inspection, the following:

(i) * * *

(ii) * * *

* * * * *

25. In § 754.5, revise paragraph (b)(2) to read as follows:

§ 754.5 Horses for Export by Sea

* * * * *

b *License policy.* (1) * * *

(2) Other license applications will be approved if BIS, in consultation with the Department of Agriculture, determines that the horses are not intended for slaughter. You must

provide a statement in the “Additional Information” field or block of the license application, certifying that no horse under consignment is being exported for the purpose of slaughter.

26. In supplement No. 2 to part 754, revise footnote number 2 to read as follows:

² For export licensing purposes, report commodities on export license applications in units of quantity indicated.

PART 772—[AMENDED]

27. The authority citation for 15 CFR part 772 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 7, 2003, 68 FR 47833, August 11, 2003.

28. Revise § 772.1 by adding a sentence at the end of the definition of “applicant” as follows:

§ 772.1 Definitions.

* * * * *

Applicant * * *

This definition does not apply to the term “SNAP+ applicant” used in § 748.7 of the EAR.

* * * * *

Dated: November 3, 2003.

Peter Lichtenbaum,

Assistant Secretary for Export Administration.

[FR Doc. 03-28133 Filed 11-10-03; 8:45 am]

BILLING CODE 3510-33-P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 161

RIN 1076-AE46

Navajo Partitioned Lands Grazing Permits

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: This rulemaking adds a new part to the regulations of the Bureau of Indian Affairs to govern the grazing of livestock on the Navajo Partitioned Land (NPL) of the Navajo-Hopi Former Joint Use Area (FJUA) of the 1882 Executive Order reservation. The purpose of these regulations is to conserve the rangelands of the NPL in order to maximize future use of the land for grazing and other purposes.

DATES: Written comments must be submitted no later than February 10, 2004.

ADDRESSES: All comments on the proposed rule must be in writing and addressed to: Bill Downes, Acting Director, Office of Trust Responsibilities, Attn.: Agriculture and Range, MS-3061-MIB, Code 210, 1849 C Street, NW., Washington, DC 20240, Telephone (202) 208-6464.

You may submit written comments on the proposed information collection to the Desk Officer for the Department of the Interior, Office of Management and Budget, either by telefaxing to (202) 395-6566, or by e-mail to OIRA_DOCKET@omb.eop.gov.

FOR FURTHER INFORMATION CONTACT:

Harold Russell, (505) 863-8256, at the Navajo Regional Office in Gallup, New Mexico.

SUPPLEMENTARY INFORMATION: As a result of the long-standing dispute between the Hopi Tribe and the Navajo Nation over beneficial ownership of the reservation created by the Executive Order of December 16, 1882, Congress passed the Act of July 22, 1958, 72 Stat. 403, which permitted the Navajo Nation and the Hopi Tribe to sue each other in federal court to resolve the issue. The Hopi Tribe initiated such a suit on August 1, 1958, in United States District Court for the District of Arizona in *Healing v. Jones*, 174 F. Supp. 211 (D. Ariz. 1959), (*Healing I*). The merits of the case were heard by a three judge panel of the United States District Court for the District of Arizona in *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962) aff'd 373 U.S. 758 (1963), (*Healing II*) after the initial procedural challenges to the suit were dismissed in *Healing I*. The district court determined that while the Hopi Tribe had a right to the exclusive use and occupancy of a portion of the 1882 reservation know as District 6, it shared the remaining lands of the 1882 reservation in common with the Navajo Nation. Disputes between the two tribes continued over the right to use and occupy the 1882 reservation in spite of the district court's decision in *Healing II*. In an attempt to resolve these ongoing problems, Congress enacted the Navajo-Hopi Settlement Act, 25 U.S.C. 640d-640d-31, which provided for the partition of the Joint Use Area of the 1882 reservation, excluding District 6, between the two tribes. The Act was amended by the Navajo-Hopi Indian Relocation Amendments Acts of 1980, 94 Stat. 929, due to the dissatisfaction expressed by both tribes with the relocation process.

The Relocation Act Amendments added subsection (c) to 25 U.S.C. 640d-18. It required the Secretary of the Interior to complete the livestock reduction program contained in 25

U.S.C. 640d–18(a) within 18 months of its enactment. The new subsection also required that all grazing control and range restoration activities be coordinated and executed with the concurrence of the tribe to which the land had been partitioned. In 1982, the U.S. District Court for the District of Arizona determined in *Hopi Tribe v. Watt*, 530 F. Supp. 1217 (D. Ariz. 1982), that the grazing regulations contained in part 153 of 25 CFR were invalid with respect to the 1882 reservation partitioned to both the Navajo Nation and the Hopi Tribe. The court reached that conclusion because the regulations did not provide for the concurrence of the Navajo Nation or the Hopi Tribe as required by the Relocation Act Amendments. The district court's ruling was upheld by the Ninth Circuit Court of Appeals in *Hopi Tribe v. Watt*, 719 F. 2d 314 (9th Cir. 1983).

As a result of the decision in *Hopi Tribe v. Watt*, *Id.*, the Bureau of Indian Affairs sought the concurrence of the Navajo Nation for the regulations, which are herein published. The concurrence of the Navajo Nation to these regulations was provided verbally by the Navajo-Hopi Land Commission and the Navajo Nation Natural Resource Committee which met jointly on June 26, 2003. Non-substantive, editorial changes have been made to the proposed regulations, which were approved by the Navajo Nation.

These regulations are issued to implement the Secretary of the Interior's responsibilities for the Navajo Partitioned Lands as mandated by the Navajo-Hopi Settlement Act, as amended by the Relocation Act Amendments, and the previously cited federal court decisions. In 1982, part 152 of 25 CFR was re-designated as part 167, Navajo Grazing Regulations, and part 153 of 25 CFR was re-designated as part 168, Hopi Partitioned Lands Grazing Regulations. All grazing permits issued for the joint Use Area under the old 25 CFR part 152, some of which dated from 1940, were canceled within one year pursuant to the Order of Compliance issued on October 14, 1972, by the U.S. District Court of the District of Arizona in *Hamilton v. MacDonald*, Civ. 579–PCT. From 1973 through 1978, the Bureau of Indian Affairs did not issue grazing permits for the Joint Use Area (JUA) during calculation of the range's carrying capacity and stocking rates. However, in late 1977 the Joint Use Area Administrative Office of the Bureau of Indian Affairs at Flagstaff, Arizona, completed its inventory and began issuing annual grazing permits to the residents of the JUA. These interim permits were limited to one year by

order of the federal district court. Since the 1982 ruling in *Hopi v. Watt*, 530 F.2d 1217 (1983), declaring that the pre-1982 regulations were invalid, the Bureau of Indian Affairs has been subject to the provisions of the Navajo-Hopi Settlement Act, as amended, which require the development of new grazing regulations for the Navajo Partitioned Land with the concurrence of the Navajo Nation. These regulations are the product of that consultation.

Proposed rulemaking was published in the **Federal Register** on November 1, 1995 (60 FR 55506), and invited comments for 60 days ending January 2, 1996. To allow maximum input from the Navajo and Hopi Tribes and the public, an extension of the comment period to September 9, 1996 was published in the **Federal Register** on June 10, 1996 (61 FR 29327). A total of 74 written comments were received from individuals and attorneys representing the Navajo Nation, as well as individuals commenting on their own behalf. The comments were reviewed by the Navajo-Hopi Land Commission of the Navajo Nation Council NPL Subcommittee during the week of November 17, 1996. The suggested responses to the comments were sent to the Navajo Nation Resources Committee for further review and consideration on September 10, 1998. Comments and recommendations were adopted and incorporated into a proposed rule which was never finalized. We have reviewed the comments and recommendations, and incorporated them in the proposed rule where appropriate.

This rulemaking also incorporates the requirements of the American Indian Agricultural Resource Management Act (AIARMA)(107 Stat. 2011, 25 U.S.C. § 3703 *et seq.*), as amended. The purposes of AIARMA include carrying out the trust responsibility of the United States and promoting self-determination of Indian tribes by providing for the management of Indian agricultural lands and related renewable resources in a manner consistent with identified tribal goals and priorities for conservation, multiple use, and sustained yield; by authorizing the Secretary to take part in the management of Indian agricultural lands with the participation of the beneficial owners of the land in a manner consistent with the trust responsibility of the Secretary and the objectives of the beneficial owners; and by providing for the development and management of Indian agricultural land. The AIARMA requires that the Secretary conduct all land management activities on Indian agricultural lands in accordance with agricultural resource management plans, integrated resources

management plans, and all tribal laws and ordinances, except where such compliance would be contrary to the trust responsibility of the United States.

Final regulations governing grazing permits for all Indian lands were promulgated in 25 CFR part 166 on January 22, 2001, and are found at 25 CFR part 166. While part 166 applies to all Indian agricultural lands, part 161 applies only to the Navajo Partitioned Lands. Both regulations implement the requirements of AIARMA.

Section-by-Section Analysis of the Proposed Rule

Subpart A, “Definitions, Authority, Purpose and Scope,” contains key terms used throughout the proposed regulation. These terms are consistent with those found in AIARMA. This subpart also describes the Secretary's authorities under this part.

Subpart B, “Tribal Policies and Laws Pertaining to Permits,” is consistent with AIARMA and makes clear that Navajo Nation laws generally apply to land under the jurisdiction of the Navajo Nation, except to the extent that those Navajo Nation laws are inconsistent with applicable federal law. Further, unless prohibited by federal law, BIA will recognize and comply with tribal laws regulating activities on the Navajo Partitioned Lands, including tribal laws relating to land use, environmental protection, and historic or cultural preservation.

Subpart C, “General Provisions,” lists the environmental compliance and management documents that are required by AIARMA. This subpart also discusses how carrying capacity and stocking rates are established.

Subpart D, “Grazing Permit Requirements,” describes the general requirements for obtaining a permit, the provisions contained in a grazing permit, the restrictions placed on permits, and other permit requirements.

Subpart E, “Reissuance of Grazing Permits,” sets forth eligibility and priority criteria for reissuance of cancelled grazing permits. This subpart makes clear that the Navajo Nation may prescribe eligibility requirement for grazing allocations within 180 days following the effective date of these regulations. BIA will prescribe the eligibility requirements after expiration of the 180-day period in the event that the Navajo Nation does not prescribe eligibility requirements, or in the event that satisfactory action is not taken by the Navajo Nation. This subpart also describes how new permits may be granted after the initial reissuance of permits, and sets forth the procedures

for re-issuing permits and allocating permits within each range unit.

Subpart F, "Modifying A Permit," describes how permits may be transferred, assigned or modified.

Subpart G, "Permit Violations," sets forth the procedures for the investigation, notification and processing of permit violations. This section also describes the process by which mediation can be used in the event of a permit violation.

Subpart H, "Trespass," describes the process for trespass notification, enforcement, actions and penalties, damages and costs. This subpart is substantially similar to the general grazing regulations, 25 CFR, part 166, subpart I, and is consistent with AIARMA.

Subpart I, "Concurrence/Appeals/Amendments," sets forth the procedures for the Navajo Nation to provide concurrence to BIA under this part. This subpart also states that decisions made by BIA under this part may be appealed, and that decisions made by the Navajo Nation under this part may be appealed to the appropriate hearing body of the Navajo Nation.

Procedural Requirements

A. Regulatory Planning and Review (Executive Order 12866)

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Office of Management and Budget (OMB) must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles in the Executive Order.

This proposed rule describes how BIA will administer grazing permits on trust land. Thus, the impact of the rule is confined to the Federal Government and individual Indian and the Navajo Nation, and does not impose a

compliance burden on the economy generally. Accordingly, it has been determined that this rule is not a "significant regulatory action" under any of the preceding criteria.

B. Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., as amended, whenever an agency is required to publish a notice of rule making for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (e.g., small businesses, small organizations, and small government jurisdictions). Indian tribes are not considered to be small entities for purposes of the Act and, consequently, no regulatory flexibility analysis has been done.

This proposed implementation guidance does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises because it concerns only the Navajo Nation. Accordingly, this proposed regulation will not have an economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared.

C. Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996

Under 5 U.S.C. 804(2), SBREFA, a rule is major if OMB finds that it results in (1) An annual effect on the economy of \$100 million or more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

This proposed rule is not a major rule as defined by Section 804 of the SBREFA. This rule is uniquely confined to the Federal Government, individual Indians and the Navajo Nation, thus, it will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. This proposed rule provides regulatory guidance for grazing permits on trust lands owned by individual Indians and the Navajo Nation.

D. Unfunded Mandates Reform Act

The proposed implementation guidance would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Public Law 104-4, March 22, 1995, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (2 U.S.C. 1532). The impact of this proposed rule is confined to grazing permits on land held in trust for the Navajo Nation. Accordingly, this proposed rule will not result in the expenditure of \$100 million or more in any one year.

E. Takings Implication Assessment (Executive Order 12630)

This proposed implementation guidance does not have significant "takings" implications. Policies that have taking implications do not include actions affecting properties that are held in trust by the United States. The NPL grazing regulations provide specific regulatory guidance on trust lands.

F. Energy Effects (Executive Order 13211)

On May 18, 2001, the President issued Executive Order 13211 which speaks to regulations that significantly affect energy supply, distribution, and use. The Executive Order requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule is restricted to 25 CFR 161, Navajo Partitioned Lands Grazing Permits on lands held in trust for individual Indians and tribes. Mineral development on lands held in trust for individual Indians and the Navajo Nation are regulated under the Indian Mineral Development Act. Regulations for mineral development are provided under a separate part in 25 CFR 211, 212 and 225. This proposed implementation guidance is not expected to significantly affect energy supplies, distribution, or use. Therefore, no Statement of Energy Effects has been prepared.

G. Federalism (Executive Order 12612)

This proposed implementation guidance does not have significant Federalism effects because it pertains solely to Federal-tribal relations and will not interfere with the roles, rights, and responsibilities of States. While this proposed rule will impact tribal governments, there is no federalism impact on the trust relationship or balance of power between the United States government and the various tribal governments affected by this rulemaking. Therefore, in accordance with Executive Order 13132, it is

determined that this rule will not have sufficient federalism implications to warrant the preparation of a federalism assessment.

H. Civil Justice Reform (Executive Order 12988)

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, Civil Justice Reform, 61 FR 4729, February 7, 1996, imposes on executive agencies the general duty to adhere to the following requirements:

(1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for effective conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3 (a), section (b) of Executive Order 12988 specifically requires that executive agencies make every reasonable effort to insure that the regulations: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing federal law or regulation; (3) provides a clear legal standard for affecting conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of the applicable standards in section 3(a) and section 3(b) to determine whether they

are met or it is unreasonable to meet on or more of them. This proposed implementation guidance does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of the Executive Order 12988.

I. National Environmental Policy Act (NEPA)

This proposed rule is categorically excluded from the preparation of an environmental assessment or an environmental impact statement under the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*, because its environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and the Federal actions under the proposed rule (*i.e.*, approval or disapproval of grazing permits on Indian lands) will be subject at the time of the action itself to the National Environmental Policy Act process, either collectively or case-by-case. Further, no extraordinary circumstances exist to require preparation of an environmental assessment or environmental impact statement.

J. Consultation and Coordination With Indian Tribal Governments (Executive Order 13175)

Pursuant to Executive Order 13175 of November 6, 2000, Consultation and Coordination with Indian Tribal Governments, the Department has determined that because the proposed rule making will uniquely affect tribal governments it will follow Department and Administrative protocols in consulting with tribal governments on

the rulemaking. Consequently, tribal governments will be notified through this **Federal Register** document and through BIA field offices, of the ramifications of this rulemaking. This will enable tribal officials and the affected tribal constituency throughout the Navajo Partitioned Lands to have meaningful and timely input in the development of the final rule. This will reinforce good intergovernmental relations with the Navajo Nation and better inform, educate and advise the Navajo Nation on compliance requirements of the rulemaking. We consulted with representatives of the Navajo Nation during the formulation of this proposed regulation. Representatives from the Navajo-Hopi Land Commission and Navajo Nation Natural Resource Committee met in consultation several times from November 2002 to June of 2003 to draft the proposed regulations. The comments received from these consultations were taken into consideration in the formulation of the following proposed NPL Grazing regulations. We have committed to consulting with the Navajo Nation in the formulation of a final rule for the Navajo Partitioned Lands Grazing regulations.

K. Paperwork Reduction Act

This regulation requires an information collection from 10 or more parties, and therefore is subject to review under the Paperwork Reduction Act of 1995 (Pub. L. 104-13).

The table showing the burden of the information collection is included below for your information.

TABLE OF BURDEN FOR 25 CFR 161

CFR Section	Number of respondents	Number of annual responses	Hourly burden per response (hours)	Total annual hourly burden	Salary: \$5.00 × total hourly burden = total hourly burden cost	Federal burden per response (hours)	Total Federal annual burden hours	Salary: \$18.52 × total hourly burden = total Federal burden cost
161.102	700	700	.....	.....	.....	1/2	350	\$6,482
161.206	700	700	1/2	350	\$1,750	1/4	175	3,241
161.301	700	700	.....	.....	.....	1/4	175	3,241
161.302	700	700	1/3	233	1,165	1/4	175	3,241
161.304	700	700	.....	.....	.....	1/4	175	3,241
161.402	700	700	1/3	233	1,165	1	700	12,964
161.500	70	70	1/3	23	115	1	70	1,296
161.502	70	70	.....	.....	.....	1/4	17.5	324
161.604	35	35	1/2	17.5	87	1	35	648
161.606	35	35	1/2	17.5	87	1	35	648
161.703	35	35	1/2	17.5	87	1	35	648
161.704	35	35	1/2	17.5	88	1	35	648
161.708	10	10	1/2	5	25	1	10	185
161.717	10	10	1	10	50	2	20	370
161.800	700	700	1/4	175	875	1/4	212.5	3,936
161.801	85	85	1/2	42.5	213	1	85	1,575
161.802	85	85	1	85	425	1/2	42.5	787

TABLE OF BURDEN FOR 25 CFR 161—Continued

CFR Section	Number of respondents	Number of annual responses	Hourly burden per response (hours)	Total annual hourly burden	Salary: \$5.00 × total hourly burden = total hourly burden cost	Federal burden per response (hours)	Total Federal annual burden hours	Salary: \$18.52 × total hourly burden = total Federal burden cost
Totals	700	5,370	.....	1,226.5	6,132	.....	2,347.5	43,475

DOI invites comments on the information collection requirements in the proposed regulation. You may submit comments by telefacsimile at (202) 395-6566 or by e-mail at OIRA_DOCKET@omb.eop.gov. Please also send a copy of your comments to BIA at the location specified under the heading **ADDRESSES**. Note that requests for comments on the rule and the information collection are separate.

You can receive a copy of BIA's submission to OMB by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section, or by requesting the information from BIA Information Collection Clearance Officer, 1951 Constitution Avenue, NW., Mail Stop 52 SIB, Washington, DC 20240.

Comments should address: (1) Whether the proposed collection of information is necessary for the proper performance of the Program, including the practical utility of the information to BIA; (2) the accuracy of BIA's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

Please note that an agency may not sponsor or request, and an individual need not respond to, a collection of information unless it has a valid OMB Control Number. This is a new collection. OMB will assign an OMB Control Number when the collection is approved. OMB must make a decision concerning the collection of information requirements in this proposed rule no sooner than 30 days, and no later than 60 days, after it is published in the **Federal Register**. Therefore, a comment is best assured of having its maximum effect if OMB receives it within 30 days of publication. Comments on information collection requirements do not relate, however, to the deadline for general public comments on the proposed rule, indicated in the **DATES** section.

We are collecting this information in order to properly manage the grazing permits on the Navajo Partitioned Lands

in keeping with good grazing practices. We estimate that the hourly public burden for providing the information ranges from 15 minutes to 1 hour. We estimate the cost to the public to be \$6,132.00 based on an hourly cost of \$5.00. The requested information is submitted in order to obtain or retain a benefit, *i.e.*, a grazing permit. We do not require the public to maintain records except temporarily for those needed to complete reports. There is no need for confidentiality protections other than those which would be covered by FOIA/Privacy Act.

Organizations and individuals who submit comments on the information collection requirements should be aware that BIA keeps such comments available for public inspection during regular business hours. If you wish to have your name and address withheld from public inspection, you must state this prominently at the beginning of any comments you make. BIA will honor your request to the extent allowable by law.

Clarity of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following:

- (1) Are the requirements in the rule clearly stated?
- (2) Does the rule contain technical language or jargon that interferes with its clarity?
- (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity?
- (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (A "section" appears in bold type and is preceded by the symbol "§" and a numbered heading; for example, § 161.1 What definitions do I need to know?)
- (5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule?
- (6) What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW., Washington, DC 20240. You may also e-mail the comments to this address: Exsec@ios.doi.gov.

Public Comment Solicitation

If you wish to comment on this proposed rule, you may mail or hand-deliver your written comments to the person listed in the **ADDRESSES** section of this document. Comments may also be telefaxed to the following number: (202) 219-0006. We cannot accept electronic submissions at this time. All written comments received by the date indicated in the **DATES** section of this document will be carefully assessed and fully considered before publication of a final rule.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record. We will honor the request to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

List of Subjects in 25 CFR Part 161

Grazing lands, Indians-lands, Livestock.

Dated: November 6, 2003.

Aurene M. Martin,

Principal Deputy Assistant Secretary—Indian Affairs.

For the reasons stated in the preamble, the Bureau of Indian Affairs proposes to add part 161 to chapter I of

title 25 of the Code of Federal Regulations as follows.

PART 161—NAVAJO PARTITIONED LANDS GRAZING PERMITS

Subpart A—Definitions, Authority, Purpose and Scope

Sec.

- 161.1 What definitions do I need to know?
- 161.2 What are the Secretary's authorities under this part?
- 161.3 What is the purpose of this part?
- 161.4 To what lands does this part apply?
- 161.5 Can BIA waive the application of this part?
- 161.6 Are there any other restrictions on information given to BIA?

Subpart B—Tribal Policies and Laws Pertaining to Permits

- 161.100 Do tribal laws apply to grazing permits?
- 161.101 How will tribal laws be enforced on the Navajo Partitioned Lands?
- 161.102 What notifications are required that tribal laws apply to grazing permits on the Navajo Partitioned Lands?

Subpart C—General Provisions

- 161.200 Is an Indian agricultural resource management plan required?
- 161.201 Is environmental compliance required?
- 161.202 How are range units established?
- 161.203 Are range management plans required?
- 161.204 How are carrying capacities and stocking rates established?
- 161.205 How are range improvements treated?
- 161.206 What must a permittee do to protect livestock from exposure to disease?
- 161.207 What livestock are authorized to graze?

Subpart D—Permit Requirements

- 161.300 When is a permit needed to authorize grazing use?
- 161.301 What will a grazing permit contain?
- 161.302 What restrictions are placed on grazing permits?
- 161.303 How long is a permit valid?
- 161.304 Must a permit be recorded?
- 161.305 When is a decision by BIA regarding a permit effective?
- 161.306 When are permits effective?
- 161.307 When may a permittee commence grazing on Navajo Partitioned Land?
- 161.308 Must permittee comply with standards of conduct if granted a permit?

Subpart E—Reissuance of Grazing Permits

- 161.400 What are the criteria for reissuing grazing permits?
- 161.401 Will new permits be granted after the initial reissuance of permits?
- 161.402 What are the procedures for reissuing permits?
- 161.403 How are grazing permits allocated within each range unit?

Subpart F—Modifying a Permit

- 161.500 May permits be transferred, assigned or modified?

- 161.501 When will a permit modification be effective?
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Subpart G—Permit Violations

- 161.600 What permit violations are addressed by this subpart?
- 161.601 How will BIA monitor permit compliance?
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- 161.603 Can a permit provide for mediation in the event of a permit violation or dispute?
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- 161.607 What appeal bond provisions apply to permit cancellation decisions?
- 161.608 When will a permit cancellation be effective?
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- 161.700 What is trespass?
- 161.701 What is BIA's trespass policy?
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Notification

- 161.703 How are trespassers notified of a trespass determination?
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- 161.706 What actions does BIA take against trespassers?
- 161.707 When will BIA impound unauthorized livestock or other property?
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- 161.710 How can impounded livestock or other property be redeemed?
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- 161.712 What are the penalties, damages, and costs payable by trespassers?
- 161.713 How will BIA determine the amount of damages to Navajo Partitioned Lands?
- 161.714 How will BIA determine the costs associated with enforcement of the trespass?
- 161.715 What will BIA do if a trespasser fails to pay penalties, damages and costs?
- 161.716 How are the proceeds from trespass distributed?
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Subpart I—Concurrence/Appeals/Amendments

- 161.800 How does the Navajo Nation to provide concurrence to BIA?
- 161.801 May decisions under this part be appealed?
- 161.802 How will the Navajo Nation recommend amendments to this part?

Authority: 25 U.S.C. 2; 5 U.S.C. 301; 25 U.S.C. 640d *et seq.*

Subpart A—Definitions, Authority, Purpose, and Scope

§ 161.1 What definitions do I need to know?

Agricultural Act means the American Indians Agricultural Resource Management Act (AIARMA) of December 3, 1993 (107 Stat. 2011, 25 U.S.C. § 3701 *et seq.*), and amended on November 2, 1994 (108 Stat. 4572).

Agricultural resource management plan means a 10-year plan developed through the public review process specifying the tribal management goals and objectives developed for tribal agricultural and grazing resources. Plans developed and approved under AIARMA will govern the management and administration of Indian agricultural resources and Indian agricultural lands by BIA and Indian tribal governments.

Allocation means the number of animal units authorized in each grazing permit.

Animal Unit (AU) means one adult cow and her 6-month-old calf or the equivalent thereof based on comparable forage consumption. Thus as defined in the following:

- (1) One adult sheep or goat is equivalent to one-fifth (0.20) of an AU;
- (2) One adult horse, mule, or burro is equivalent to one and one quarter (1.25) AU; or
- (3) One adult llama is equivalent to three-fifths (0.60) of an AU.

Appeal means a written request for review of an action or the inaction of an official of the Bureau of Indian Affairs that is claimed to adversely affect the interested party making the request.

Appeal Bond means a bond posted upon filing of an appeal that provides a security or guaranty if an appeal creates a delay in implementing our decision that could cause a significant and measurable financial loss to another party.

BIA means the Bureau of Indian Affairs within the Department of the Interior.

Bond means security for the performance of certain permit obligations, as furnished by the permittee, or a guaranty of such performance as furnished by a third-party surety.

Business day means Monday through Friday, excluding federally or tribally recognized holidays.

Carrying capacity means the number of livestock and/or wildlife, which may be sustained on a management unit compatible with management objectives for the unit.

Concurrence means the written agreement of the Navajo Nation with a policy, action, decision or finding submitted for consideration by BIA.

Conservation practice refers to any management measure taken to maintain or improve the condition, productivity, sustainability, or usability of targeted resources.

Customary Use Area refers to an area to which an individual traditionally confined his or her traditional grazing use and occupancy and/or an area traditionally inhabited by his or her ancestors.

Day means a calendar day, unless otherwise specified.

Enumeration means the list of persons living on and identified improvements located within the Former Joint Use Area obtained through interviews conducted by BIA in 1974 and 1975.

Former Joint Use Area means the area that was divided between the Navajo Nation and the Hopi Tribe by the Judgment of Partition issued April 18, 1979, by the United States District Court for the District of Arizona. This area was established by the United States District Court for the District of Arizona in *Healing v. Jones*, 210 F. Supp. 125 (1962), aff'd, 373 U.S. 758 (1963) and is located:

- (1) Inside the Executive Order area (Executive Order of December 16, 1882); and
- (2) Outside Land Management District 6.

Grazing Committee means the District Grazing Committee established by the Navajo Nation Council, who is responsible for enforcing and implementing tribal grazing regulations on the Navajo Partitioned Lands.

Grazing Permit means a revocable privilege granted in writing and limited to entering on and utilizing forage by domestic livestock on a specified range unit. The term as used herein shall include authorizations issued to enable the crossing or trailing of domestic livestock within assign range unit.

Historical Land Use: see Customary Use Area.

Improvement means any structure or excavation to facilitate management of the range for livestock.

Livestock means horses, cattle, sheep, goats, mules, burros, donkeys, and llamas.

Management Unit is a subdivision of a geographic area where unique resource conditions, goals, concerns, or opportunities require specific and separate management planning.

Navajo Nation means all offices/entities/programs under the direct jurisdiction of the Navajo Nation Government.

Navajo Partitioned Lands (NPL) means that portion of the Former Joint Use Area awarded to the Navajo Nation under the Judgment of Partition issued April 18, 1979, by the United States District Court for the District of Arizona, and now a separate administrative entity within the Navajo Indian Reservation.

Non-Concurrence means the official written denial of approval by the Navajo Nation of a policy, action, decision, or finding submitted for consideration by BIA.

Range management plan is a statement of management objectives for grazing, farming, or other agriculture management including contract stipulations defining required uses, operations, and improvements.

Range Unit means a tract of land designated as a separate management subdivision for the administration of grazing.

Resident means a person who lives on the Navajo Partitioned Lands.

Resources Committee means the oversight committee for the Division of Natural Resources within the Navajo Nation Government. The Resources Committee of the Navajo Nation Council to whom authority is delegated to exercise the powers of the Navajo Nation with regards to the range development and grazing management of the Navajo Partitioned Lands.

Secretary means the Secretary of the Interior or his or her designated representative.

Settlement Act means the Navajo Hopi Settlement Act of December 22, 1974 (88 Stat. 1712, 25 U.S.C. § 64d et seq., as amended).

Sheep Unit means an adult ewe with un-weaned lamb. It is also the basic unit in which forage allocations are expressed.

Sheep Unit Year Long refers to the amount of forage needed to sustain one sheep unit for one year.

Special land use means all land usage for purposes other than for grazing withdrawn in accordance with Navajo Nation laws, Federal laws, and BIA policies and procedures, such as but not limited to: Housing permits, farm leases, governmental facilities, rights-of-way, schools, parks, business leases, etc.

Special management area means an area for which a single management

plan is developed and applied in response to special management objectives such as watershed management, fire hazard areas, or other similar concerns.

Stocking rate means the maximum number of sheep units, or animal units authorized to graze on a particular pasture, management unit, or range unit during a specified period of time.

Trespass means any unauthorized occupancy, grazing, use of, or action on the Navajo Partitioned Lands.

§ 161.2 What are the Secretary's authorities under this part?

(a) Under Section 640d–9(e) of the Settlement Act, lands partitioned under the Settlement Act are subject to the jurisdiction of the tribe to whom partitioned. The laws of the tribe apply to the partitioned lands as in paragraphs (a)(1) and (a)(2) of this section.

(1) Effective October 6, 1980:

(i) All conservation practices on the Navajo Partitioned Lands, including control and range restoration activities, must be coordinated and executed with the concurrence of the Navajo Nation; and

(ii) All grazing and range restoration matters on the Navajo Reservation lands must be administered by BIA, under applicable laws and regulations.

(2) Effective April 18, 1981, the Navajo Nation has jurisdiction and authority over any lands partitioned to it and over all persons on these lands. This jurisdiction and authority apply:

(i) To the same extent as is applicable to those other portions of the Navajo reservation; and

(ii) Notwithstanding any provision of law to the contrary, except where there is a conflict with the laws and regulations referred to in paragraph (a) of this section.

(b) Under the Agricultural Act, the Secretary is authorized to:

(1) Carry out the trust responsibility of the United States and promote Indian tribal self-determination by providing for management of Indian agricultural lands and renewable resources consistent with tribal goals and priorities for conservation, multiple use, and sustained yield;

(2) Take part in managing Indian agricultural lands, with the participation of the land's beneficial owners, in a manner consistent with the Secretary's trust responsibility and with the objectives of the beneficial owners;

(3) Provide for the development and management of Indian agricultural lands; and

(4) Improving the expertise and technical abilities of Indian tribes and their members by increasing the

educational and training opportunities available to Indian people and communities in the practical, technical, and professional aspects of agricultural and land management.

§ 161.3 What is the purpose of this part?

The purpose of this part is to describe the goals and objectives of grazing management on the Navajo Partitioned Lands:

(a) Provide resources to rehabilitate range resources in the preservation of forage, soil, and water on the Navajo Partitioned Lands;

(b) Monitor the recovery of those resources where they have deteriorated;

(c) Protect, conserve, utilize, and maintain the highest productive potential on the Navajo Partitioned Lands through the application of sound conservation practices and techniques. These practices and techniques will be applied to planning, development, inventorying, classification, and management of agricultural resources;

(d) Increase production and expand the diversity and availability of agricultural products for subsistence, income, and employment of Indians, through the development of agricultural resources on the Navajo Partitioned Lands;

(e) Manage agricultural resources consistent with integrated resource management plans in order to protect and maintain other values such as wildlife, fisheries, cultural resources, recreation and to regulate water runoff and minimize soil erosion;

(f) Enable the Navajo Nation to maximize the potential benefits available to its members from their lands by providing technical assistance, training, and education in conservation practices, management and economics of agribusiness, sources and use of credit and marketing of agricultural products, and other applicable subject areas;

(g) Develop the Navajo Partitioned Lands to promote self-sustaining communities; and

(h) Assist the Navajo Nation with permitting the Navajo Partitioned Lands, consistent with prudent management and conservation practices, and community goals as expressed in the tribal management plans and appropriate tribal ordinances.

§ 161.4 To what lands does this part apply?

The grazing regulations in this part apply to the Navajo Partitioned Lands within the boundaries of the Navajo Indian Reservation held in trust by the United States for the Navajo Nation. Contiguous areas outside of the Navajo

Partitioned Lands may be included under this part, for management purposes by BIA in consultation with the affected permittees and other affected land users, and with the concurrence of the Resources Committee.

§ 161.5 Can BIA waive the application of this part?

Yes, if a provision of this part conflicts with the objectives of the agricultural resource management plan provided for in § 161.200, or with a tribal law, BIA may waive the application of this part unless the waiver would either:

(a) Constitute a violation of a federal statute or judicial decision; or

(b) Conflict with BIA's general trust responsibility under federal law.

§ 161.6 Are there any other restrictions on information given to BIA?

Information that the BIA collects in connection with permits for NPL in sections 161.102, 161.206, 161.301, 161.302, 161.304, 161.402, 161.500, 161.502, 161.604, 161.606, 161.703, 161.704, 161.708, 161.717, 161.800, 161.801, and 161.802 have been reviewed and approved by the Office of Management and Budget. The OMB Control Number assigned is 1076-01XX. Please note that a federal agency may not conduct or sponsor, and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

Subpart B—Tribal Policies and Laws Pertaining to Permits

§ 161.100 Do tribal laws apply to grazing permits?

Navajo Nation laws generally apply to land under the jurisdiction of the Navajo Nation, except to the extent that those Navajo Nation laws are inconsistent with this part or other applicable federal law. This part may be superseded or modified by Navajo Nation laws with Secretarial approval, however, so long as:

(a) The Navajo Nation laws are consistent with the enacting Navajo Nation's governing documents;

(b) The Navajo Nation has notified BIA of the superseding or modifying effect of the Navajo Nation laws;

(c) The superseding or modifying of the regulation would not violate a federal statute or judicial decision, or conflict with the Secretary's general trust responsibility under federal law; and

(d) The superseding or modifying of the regulation applies only to Navajo Partitioned Lands.

§ 161.101 How will tribal laws be enforced on the Navajo Partitioned Lands?

(a) Unless prohibited by federal law, BIA will recognize and comply with tribal laws regulating activities on the Navajo Partitioned Lands, including tribal laws relating to land use, environmental protection, and historic or cultural preservation.

(b) While the Navajo Nation is primarily responsible for enforcing tribal laws pertaining to the Navajo Partitioned Lands, BIA will:

(1) Assist in the enforcement of Navajo Nation laws;

(2) Provide notice of Navajo Nation laws to persons or entities undertaking activities on the Navajo Partitioned Lands; and

(3) Require appropriate federal officials to appear in tribal forums when requested by the tribe, so long as the appearance would not:

(i) Be consistent with the restrictions on employee testimony set forth at 43 CFR part 2, subpart E;

(ii) Constitute a waiver of the sovereign immunity of the United States; or

(iii) Authorize or result in a review of (BIA) actions by the tribal court.

(c) Where the provisions in this subpart are inconsistent with a Navajo Nation law, but the provisions cannot be superseded or modified by the Navajo Nation laws under § 161.5, BIA may waive the provisions under part 1 of this title, so long as the new waiver does not violate a federal statute or judicial decision or conflict with the Secretary's trust responsibility under federal law.

§ 161.102 What notifications are required that tribal laws apply to grazing permits on the Navajo Partitioned Lands?

(a) The Navajo Nation must provide BIA with an official copy of any tribal law or tribal policy that relates to this part. The Navajo Nation must notify BIA of the content and effective dates of tribal laws.

(b) BIA will then notify affected permittees of the effect of the Navajo Nation law on their grazing permits. BIA will:

(1) Provide individual written notice; or

(2) Post public notice. This notice will be posted at the tribal community building, U.S. Post Office, announced on local radio station, and/or published in the local newspaper nearest to the permitted Navajo Partitioned Lands where activities are occurring.

Subpart C—General Provisions**§ 161.200 Is an Indian agricultural resource management plan required?**

(a) Yes, Navajo Partitioned Lands must be managed in accordance with the goals and objectives in the agricultural resource management plan developed by the Navajo Nation, or by BIA in close consultation with the Navajo Nation, under the Agricultural Act.

(b) The 10-year agricultural resource management and monitoring plan must be developed through public meetings and completed within 3 years of the initiation of the planning activity. The plan must be based on the public meeting records and existing survey documents, reports, and other research from Federal agencies, tribal community colleges, and land grant universities. When completed, the plan must:

- (1) Determine available agricultural resources;
- (2) Identify specific tribal agricultural resource goals and objectives;
- (3) Establish management objectives for the resources;
- (4) Define critical values of the tribe and its members and provide identified resource management objectives; and
- (5) Identify actions to be taken to reach established objectives.

(c) Where the provisions in this subpart are inconsistent with the Navajo Nation's agricultural resource management plan, the Secretary may waive the provisions under part 1 of this title, so long as the waiver does not violate a federal statute or judicial decision or conflict with the Secretary's trust responsibility under federal law.

§ 161.201 Is environmental compliance required?

Actions taken by BIA under this part must comply with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, applicable provisions of the Council on Environmental Quality, 40 CFR part 1500, and applicable tribal laws and provisions of the Navajo Nation Environmental Policy Act CAP-47-95, where the tribal laws and provisions do not violate a federal or judicial decision or conflict with the Secretary's trust responsibility under federal law.

§ 161.202 How are range units established?

(a) BIA, with the concurrence of the Navajo Nation, will establish range units on the Navajo Partitioned Lands to provide unified areas for which range management plans can be developed to improve and maintain soil and forage resources. Physical land features,

watersheds, drainage patterns, vegetation, soil, resident concentration, problem areas, historical land use patterns, chapter boundaries, special land uses and comprehensive land use planning will be considered in the determination of range unit boundaries.

(b) BIA may modify range unit boundaries with the concurrence of the Navajo Nation. This may include small and/or isolated portions of Navajo Partitioned Lands contiguous to Navajo tribal lands in order to develop more efficient land management.

§ 161.203 Are range management plans required?

Range management plans are required. BIA will:

(a) Consult with the Navajo Nation in planning conservation practices, including grazing control and range restoration activities for the Navajo Partitioned Lands.

(b) Develop range management plans with the concurrence of the Navajo Nation.

(c) Approve the range management plan, after concurrence with the Navajo Nation, and the implementation of the plan may begin immediately. The plan will address, but is not limited to, the following issues:

- (1) Goals for improving vegetative productivity and diversity;
- (2) Stocking rates;
- (3) Grazing schedules;
- (4) Wildlife management;
- (5) Needs assessment for range and livestock improvements;
- (6) Schedule for operation and maintenance of existing range improvements and development for cooperative funded projects;
- (7) Cooperation in the implementation of range studies;
- (8) Control of livestock diseases and parasites;
- (9) Fencing or other structures necessary to implement any of the other provisions in the range management plan;
- (10) Special land uses; and
- (11) Water development and management.

§ 161.204 How are carrying capacities and stocking rates established?

(a) BIA, with the concurrence of the Navajo Nation, will prescribe, review and adjust the carrying capacity of each range unit by determining the number of livestock, and/or wildlife, that can be grazed on the Navajo Partitioned Lands without inducing damage to vegetation or related resources on each range unit and the season or seasons of use to achieve the objectives of the agricultural resource management plan and range unit management plan.

(b) BIA, with the concurrence of the Navajo Nation, will establish the stocking rate of each range or management unit. The stocking rate will be based on forage production, range utilization, the application of land management practices, and range improvements in place to achieve uniformity of grazing under sustained yield management principles on each range or management unit.

(c) BIA will review the carrying capacity of the grazing units on a continuing basis and, in consultation with the Grazing Committee and affected permittees, adjust the stocking rate for each range or management unit as conditions warrant.

(d) Any adjustments in stocking rates will be applied equally to each permittee within the management unit requiring adjustment.

§ 161.205 How are range improvements treated?

(a) Improvements placed on the Navajo Partitioned Lands will be considered affixed to the land unless specifically exempted in the permit. No improvement may be constructed or removed from Navajo Partitioned Lands without the written consent of BIA and the Navajo Nation.

(b) Before undertaking an improvement, BIA, Navajo Nation and permittee will negotiate who will complete and maintain improvements. The improvement agreement will be reflected in the permit.

§ 161.206 What must a permittee do to protect livestock from exposure to disease?

In accordance with applicable law, permittees must:

- (a) Vaccinate livestock;
- (b) Treat all livestock exposed to or infected with contagious or infectious diseases; and
- (c) Restrict the movement of exposed or infected livestock.

§ 161.207 What livestock are authorized to graze?

The following livestock are authorized to graze on the Navajo Partitioned Lands: horses, cattle, sheep, goats, mules, burros, donkeys, and llamas.

Subpart D—Permit Requirements**§ 161.300 When is a permit needed to authorize grazing use?**

Unless otherwise provided for in this part, any person or legal entity, including an independent legal entity owned and operated by the Navajo Nation, must obtain a permit under this part before using Navajo Partitioned Land for grazing purposes.

§ 161.301 What will a grazing permit contain?

(a) All grazing permits will contain the following provisions:

- (1) Name of permit holder;
- (2) Range management plan requirements;
- (3) Applicable stocking rate;
- (4) Range unit number and description of the permitted area;
- (5) Animal identification requirements (*i.e.* brand, microchip, freeze brand, earmark, tattoo, etc.);
- (6) Term of permit (including beginning and ending dates of the term allowed, as well as an option to renew, or extend);
- (7) A provision stating that the permittee agrees that he or she will not use, cause, or allow to be used any part of the permitted area for any unlawful conduct or purpose;
- (8) A provision stating that the permit authorizes no other privilege than grazing use;
- (9) A provision stating that no person is allowed to hold a grazing permit in more than one range unit of the Navajo Partitioned Lands, unless the customary use area extends beyond the range unit boundary;
- (10) A provision reserving a right of entry by BIA and the Navajo Nation for range survey, inventory and inspection or compliance purposes;
- (11) A provision prohibiting the creation of a nuisance, any illegal activity, and negligent use or waste of resources;
- (12) A provision stating how trespass proceeds are to be distributed;
- (13) A provision stating whether mediation will be used in the event of a permit violation;
- (14) A provision stating that the permittee holds harmless the United States and the Navajo Nation against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials or the release or discharge of any hazardous material from the permitted premises that occur during the permit term, regardless of fault; and
- (15) A provision stating that the permit cannot be subdivided once it has been issued.

(b) Grazing permits will contain any other provision that in the discretion of BIA with the concurrence of the Navajo Nation is necessary to protect the land and/or resources, may be added to the permit.

(c) Grazing permits will contain any special land use authorized under § 161.503 of this part must be included on the permit.

§ 161.302 What restrictions are placed on grazing permits?

Only a grazing permit issued under this part authorizes the grazing of livestock within the Navajo Partitioned Lands. Grazing permits are subject to the following restrictions:

(a) Grazing permits should not be issued for less than 2 animal units (10 sheep units) or exceed 70 animal units (350 sheep units). However, all grazing permits issued before the adoption of this regulation will be honored and reissued if the permittee meets the eligibility and priority criteria found in § 400 of this part, and only if the carrying capacity and stocking rate as determined under §§ 204 and 403 allows.

(b) A grazing permit will be issued in the name of one individual.

(c) Only two horses will be permitted on a grazing permit.

(d) Grazing permits may contain additional conditions authorized by Federal law or Navajo Nation law.

(e) A state/tribal brand only identifies the owner of the livestock, but does not authorize the grazing of any livestock within the Navajo Partitioned Lands.

(f) A permit cannot be subdivided once it has been issued.

§ 161.303 How long is a permit valid?

After its initial issuance, each grazing permit is valid for one year beginning on the following January 1. All permits will be automatically renewed annually if the permittee is in compliance with all applicable laws including tallies and permit requirements.

§ 161.304 Must a permit be recorded?

A permit must be recorded by BIA following approval under this subpart.

§ 161.305 When is a decision by BIA regarding a permit effective?

BIA approval of a permit will be effective immediately upon signature, notwithstanding any appeal, which may be filed under part 2 of this title. Copies of the approved permit will be provided to the permittee and made available to the Navajo Nation upon request.

§ 161.306 When are permits effective?

Unless otherwise provided in the permit, a permit will be effective on the date on which BIA approves the permit.

§ 161.307 When may a permittee commence grazing on Navajo Partitioned Land?

The permittee may graze on Navajo Partitioned Land on the date specified in the permit as the beginning date of the term, but not before BIA approves the permit.

§ 161.308 Must permittee comply with standards of conduct if granted a permit?

Permittees must comply with standards of conduct and are expected to:

(a) Conduct grazing operations in accordance with the principles of sustained yield management, agricultural resource management planning, sound conservation practices, and other community goals as expressed in Navajo Nation laws, agricultural resource management plans, and similar sources.

(b) Comply with all applicable laws, ordinances, rules, provisions, and other legal requirements. Permittee must also pay all applicable penalties that may be assessed for non-compliance.

(c) Fulfill all financial permit obligations owed to the Navajo Nation and the United States.

(d) Conduct only those activities authorized by the permit.

Subpart E—Reissuance of Grazing Permits**§ 161.400 What are the criteria for reissuing grazing permits?**

(a) The Navajo Nation may prescribe eligibility requirements for grazing allocations within 180 days following the effective date of this part. BIA will prescribe the eligibility requirements after expiration of the 180-day period if the Navajo Nation does not prescribe eligibility requirements, or if satisfactory action is not taken by the Navajo Nation.

(b) With the written concurrence of the Navajo Nation, BIA will prescribe the following eligibility requirements, where only those applicants who meet the following criteria are eligible to receive permits to graze livestock:

(1) Those who had grazing permits on Navajo Partitioned Lands under 25 CFR part 167 (formerly part 152), and whose permits were canceled on October 14, 1973;

(2) Those who are listed in the 1974 and 1975 Former Joint Use Area enumeration;

(3) Those who are current residents on Navajo Partitioned Lands; and

(4) Those who have a customary use area on Navajo Partitioned Lands.

(c) Permits reissued to applicants under this section may be granted by BIA based on the following priority criteria:

(1) The first priority will go to individuals currently over the age of 65; and

(2) The second priority will go to individuals under the age of 65.

(d) Upon the recommendation of the NPL District Grazing Committee and

Resource Committee, BIA or Navajo Nation will have authority to waive one of the eligibility or priority criteria.

§ 161.401 Will new permits be granted after the initial reissuance of permits?

(a) Following the initial reissuance of permits under § 161.400, the Navajo Nation can grant new permits if:

- (1) Additional permits become available; and
- (2) The carrying capacity and stocking rates as determined under §§ 161.204 and 161.403 allow.

(b) The Navajo Nation must inform BIA if it grants any permits under paragraph (a) of this section.

§ 161.402 What are the procedures for reissuing permits?

BIA, with the concurrence of the Navajo Nation, will reissue grazing permits only to individuals that meet the eligibility requirements in § 161.400. Responsibilities for reissuance of grazing permits are as follows:

(a) BIA will develop a complete list consisting of all former permittees whose permits were cancelled and the number of animal units previously authorized in prior grazing permits. This list will be provided to the Grazing Committee and Resources Committee for their review. BIA will also provide the Grazing Committee and Resources Committee with the current carrying capacity and stocking rate for each range unit within the Navajo Partitioned Lands, as determined under § 161.204.

(b) Within 90 days of receipt, the Grazing Committee will review the list developed under § 161.402(a), and make recommendations to the Resources Committee for the granting of grazing permits according to the eligibility and priority criteria in § 161.400.

(c) If the Grazing Committee fails to make its recommendation to the Resources Committee within 90 days after receiving the list of potential permittees, BIA will submit its recommendations to the Resources Committee.

(d) The Resources Committee will review and concur with the list of proposed permit grantees, and then forward a final list to BIA for the reissuance of grazing permits. If the Resources Committee does not concur, the procedures outlined in § 161.800 will govern.

(e) The final determination list of eligible permittees will be published. Permits will not be issued sooner than 90 days following publication of the final list.

§ 161.403 How are grazing permits allocated within each range unit?

(a) Initial allocation of the number of animal units authorized in each grazing permit will be determined by considering the number of animal units previously authorized in prior grazing permits and the current authorized stocking rate on a given range unit.

(b) Grazing permit allocations may vary from range unit to range unit depending on the stocking rate of each unit, the range management plan, and the number of eligible grazing permittees in the unit.

Subpart F—Modifying A Permit

§ 161.500 May permits be transferred, assigned or modified?

(a) Grazing permits may be transferred, assigned, or modified only as provided in this section. Permits may only be transferred or assigned as a single permit under Navajo Nation procedures and with the approval of BIA. Permittees must reside within the same range unit as the original permittee.

(b) Permits may be transferred, assigned, or modified with the written consent of the permittee, District Grazing Committee and/or Resource Committee and approved by BIA.

(c) BIA must record each transfer, assignment, or modification that it approves under a permit.

§ 161.501 When will a permit modification be effective?

BIA approval of a transfer, assignment, or modification under a permit will be effective immediately, notwithstanding any appeal, which may be filed under part 2 of this title. Copies of approved documents will be provided to the permittee and made available to the Navajo Nation upon request.

§ 161.502 Will a special land use require permit modification?

Yes, when the Navajo Nation and BIA approve a special land use, the grazing permit will be modified to reflect the change in available forage. If a special land use is inconsistent with grazing activities authorized in the permit, the special land use area will be withdrawn from the permit, and grazing cannot take place on that part of the range unit.

Subpart G—Permit Violations

§ 161.600 What permit violations are addressed by this subpart?

This subpart addresses violations of permit provisions other than trespass. Trespass is addressed under subpart H.

§ 161.601 How will BIA monitor permit compliance?

Unless the permit provides otherwise, BIA may enter the range unit at any reasonable time, without prior notice, to protect the interests of the Navajo Nation and ensure that the permittee is in compliance with the operating requirements of the permit.

§ 161.602 Will my permit be canceled for non-use?

(a) If a grazing permit is not used by the permittee for a 2-year period, BIA may cancel the permit upon the recommendation of the Grazing Committee and with the concurrence of the Resources Committee under § 161.606(c). Non-use consists of, but is not limited to, absence of livestock on the range unit, and/or abandonment of a permittee's grazing permit.

(b) Unused grazing permits or portions of grazing permits that are set aside for range recovery will not be cancelled for non-use.

§ 161.603 Can a permit provide for mediation in the event of a permit violation or dispute?

A permit may provide for permit disputes or violations to be resolved with the District Grazing Committee through mediation.

(a) The District Grazing Committee will conduct the mediation before the Resources Committee or BIA invoke any cancellation remedies.

(b) Conducting the mediation may substitute for permit cancellation. However, BIA retains the authority to cancel the permit under § 161.606.

(c) The Resources Committee decision will be final, unless it is appealed to the Navajo Nation Supreme Court on a question of law. BIA may not be bound by decisions made in these forums, but BIA will defer to any ongoing proceedings, as appropriate, in deciding whether to exercise any of the remedies available to BIA under § 161.606.

§ 161.604 What happens if a permit violation occurs?

(a) If the Resources Committee notifies BIA that a specific permit violation has occurred, BIA will initiate an appropriate investigation within 5 business days of that notification.

(b) Unless otherwise provided under tribal law, when BIA has reason to believe that a permit violation has occurred, BIA or the authorized tribal representative will provide written notice to the permittee within 5 business days.

§ 161.605 What will a written notice of a permit violation contain?

The written notice of a permit violation will provide the permittee with 10 days from the receipt of the written notice to:

- (a) Cure the permit violation and notify BIA that the violation is cured;
- (b) Explain why BIA should not cancel the permit;
- (c) Request in writing additional time to complete corrective actions. If additional time is granted, BIA may require that certain actions be taken immediately; or
- (d) Request mediation under § 161.603.

§ 161.606 What will BIA do if the permittee doesn't cure a violation on time?

(a) If the permittee does not cure a violation within the required time period, or if the violation is not referred to District Grazing Committee for mediation, BIA will consult with the Navajo Nation, as appropriate, and determine whether:

- (1) The permit may be canceled by BIA under paragraph (c) of this section and §§ 161.607 through 161.608;
- (2) BIA may invoke any other remedies available to BIA under the permit;
- (3) The Navajo Nation may invoke any remedies available to them under the permit; or
- (4) The permittee may be granted additional time in which to cure the violation.

(b) If BIA grants a permittee a time extension to cure a violation, the permittee must proceed diligently to complete the necessary corrective actions within a reasonable or specified time from the date on which the extension is granted.

(c) If BIA cancels the permit, BIA will send the permittee and the District Grazing Committee a written notice of cancellation within 5 business days of the decision. BIA will also provide actual or constructive notice of the cancellation to the Navajo Nation, as appropriate. The written notice of cancellation will:

- (1) Explain the grounds for cancellation;
- (2) Notify the permittee of the amount of any unpaid fees and other financial obligations due under the permit;
- (3) Notify the permittee of its right to appeal under 25 CFR part 2 of this title, as modified by § 161.607, including the amount of any appeal bond that must be posted with an appeal of the cancellation decision; and
- (4) Order the permittee to cease grazing livestock on the next anniversary date of the grazing permit or

180 days following the receipt of the written notice of cancellation, whichever is sooner.

§ 161.607 What appeal bond provisions apply to permit cancellation decisions?

(a) The appeal bond provisions in § 2.5 of part 2 of this title will not apply to appeals from permit cancellation decision. Instead, when BIA decides to cancel a permit, BIA may require the permittee to post an appeal bond with an appeal of the cancellation decision. The requirement to post an appeal bond will apply in addition to all of the other requirements in part 2 of this title.

(b) An appeal bond should be set in an amount necessary to protect the Navajo Nation against financial losses that will likely result from the delay caused by an appeal. Appeal bond requirements will not be separately appealable, but may be contested during the appeal of the permit cancellation decision.

§ 161.608 When will a permit cancellation be effective?

A cancellation decision involving a permit will not be effective for 30 days after the permittee receives a written notice of cancellation from BIA. The cancellation decision will remain ineffective if the permittee files an appeal under § 161.607 and part 2 of this title, unless the decision is made immediately effective under part 2. While a cancellation decision is ineffective, the permittee must continue to comply with the other terms of the permit. If an appeal is not filed in accordance with § 161.607 and part 2 of this title, the cancellation decision will be effective on the 31st day after the permittee receives the written notice of cancellation from BIA.

§ 161.609 Can BIA take emergency action if the rangeland is threatened?

Yes, if a permittee or any other party causes or threatens to cause immediate, significant and irreparable harm to the Navajo Nation land during the term of a permit, BIA will take appropriate emergency action. Emergency action may include trespass proceedings under subpart H, or judicial action seeking immediate cessation of the activity resulting in or threatening harm. Reasonable efforts will be made to notify the Navajo Nation, either before or after the emergency action is taken.

§ 161.610 What will BIA do if livestock is not removed when a permit expires or is cancelled?

If the livestock is not removed after the expiration or cancellation of a permit, BIA will treat the unauthorized use as a trespass. BIA may remove the

livestock on behalf of the Navajo Nation, and pursue any additional remedies available under applicable law, including the assessment of civil penalties and costs under subpart H.

Subpart H—Trespass**§ 161.700 What is trespass?**

Under this part, trespass is any unauthorized use of, or action on, Navajo partitioned grazing lands.

§ 161.701 What is BIA's trespass policy?

BIA will:

- (a) Investigate accidental, willful, and/or incidental trespass on Navajo Partitioned Lands;
- (b) Respond to alleged trespass in a prompt, efficient manner;
- (c) Assess trespass penalties for the value of products used or removed, cost of damage to the Navajo Partitioned Lands, and enforcement costs incurred as a consequence of the trespass; and
- (d) Ensure, to the extent possible, that damage to Navajo Partitioned Lands resulting from trespass is rehabilitated and stabilized at the expense of the trespasser.

§ 161.702 Who will enforce this subpart?

(a) BIA enforces the provisions, the Navajo Nation adopts the provisions, and the Navajo Nation will have concurrent jurisdiction to enforce this subpart. Additionally, if the Navajo Nation so requests, BIA will defer to tribal prosecution of trespass on Navajo Partitioned Lands.

(b) Nothing in this subpart will be construed to diminish the sovereign authority of the Navajo Nation with respect to trespass.

Notification**§ 161.703 How are trespassers notified of a trespass determination?**

(a) Unless otherwise provided under tribal law, when BIA has reason to believe that a trespass on Navajo Partitioned Lands has occurred, BIA or the authorized tribal representative will provide written notice within 5 business days to:

- (1) The alleged trespasser;
 - (2) The possessor of trespass property; and
 - (3) Any known lien holder.
- (b) The written notice under paragraph (a) of this section will include the following:

- (1) The basis for the trespass determination;
- (2) A legal description of where the trespass occurred;
- (3) A verification of ownership of unauthorized property (e.g., brands in the State Brand Book for cases of livestock trespass, if applicable);

(4) Corrective actions that must be taken;

(5) Time frames for taking the corrective actions;

(6) Potential consequences and penalties for failure to take corrective action; and

(7) A statement that unauthorized livestock or other property may not be removed or disposed of unless authorized by BIA under paragraph (b)(4) of this section.

(c) If BIA determines that the alleged trespasser or possessor of trespass property is unknown or refuses delivery of the written notice, a public trespass notice will be posted at the tribal community building, U.S. Post Office, and published in the local newspaper nearest to the Indian agricultural lands where the trespass is occurring.

(d) Trespass notices under this subpart are not subject to appeal under part 2 of this title.

§ 161.704 What can a permittee do if they receive a trespass notice?

The trespasser will within the time frame specified in the notice:

(a) Comply with the ordered corrective actions; or

(b) Contact BIA in writing to explain why the trespass notice is in error. The trespasser may contact BIA by telephone but any explanation of trespass must be provided be in writing. If BIA determines that a trespass notice was issued in error, the notice will be withdrawn.

§ 161.705 How long will a written trespass notice remain in effect?

A written trespass notice will remain in effect for the same action identified in that written notice for a period of one year from the date of receipt of the written notice by the trespasser.

Actions

§ 161.706 What actions does BIA take against trespassers?

If the trespasser fails to take the corrective action as specified, BIA may take one or more of the following actions, as appropriate:

(a) Seize, impound, sell or dispose of unauthorized livestock or other property involved in the trespass. BIA may keep the property seized for use as evidence.

(b) Assess penalties, damages, and costs under § 161.712.

§ 161.707 When will BIA impound unauthorized livestock or other property?

BIA will impound unauthorized livestock or other property under the following conditions:

(a) Where there is imminent danger of severe injury to growing or harvestable crop or destruction of the range forage.

(b) When the known owner or the owner's representative of the unauthorized livestock or other property refuses to accept delivery of a written notice of trespass and the unauthorized livestock or other property are not removed within the period prescribed in the written notice.

(c) Any time after 5 days of providing notice of impoundment if the trespasser failed to correct the trespass.

§ 161.708 How are trespassers notified of impoundments?

(a) If the trespass is not corrected in the time specified in the initial trespass notice, BIA will send written notice of its intent to impound unauthorized livestock or other property to:

(1) The unauthorized livestock or property owner or representative; and

(2) Any known lien holder of the unauthorized livestock or other property.

(b) If BIA determines that the owner of the unauthorized livestock or other property or the owner's representative is unknown or refuses delivery of the written notice, a public notice of intent to impound will be posted at the tribal community building, U.S. Post Office, and published in the local newspaper nearest to the Indian agricultural lands where the trespass is occurring.

(c) After BIA has given notice as described in § 161.707, unauthorized livestock or other property will be impounded without any further notice.

§ 161.709 What happens after unauthorized livestock or other property are impounded?

Following the impoundment of unauthorized livestock or other property, BIA will provide notice that the impounded property will be sold as follows:

(a) BIA will provide written notice of the sale to the owner, the owner's representative, and any known lien holder. The written notice must include the procedure by which the impounded property may be redeemed before the sale.

(b) BIA will provide public notice of sale of impounded property by posting at the tribal community building, U.S. Post Office, and publishing in the local newspaper nearest to the Indian agricultural lands where the trespass is occurring. The public notice will include a description of the impounded property, and the date, time, and place of the public sale. The sale date must be at least 5 days after the publication and posting of notice.

§ 161.710 How can impounded livestock or other property be redeemed?

Impounded livestock or other property may be redeemed by submitting proof of ownership and paying all penalties, damages, and costs under § 161.712 and completing all corrective actions identified by BIA under § 161.704.

§ 161.711 How will BIA sell impounded livestock or other property?

(a) Unless the owner or known lien holder of the impounded livestock or other property redeems the property before the time set by the sale, by submitting proof of ownership and settling all obligations under §§ 161.704 and 161.712, the property will be sold by public sale to the highest bidder.

(b) If a satisfactory bid is not received, the livestock or property may be re-offered for sale, returned to the owner, condemned and destroyed, or otherwise disposed of.

(c) BIA will give the purchaser a bill of sale or other written receipt evidencing the sale.

Penalties, Damages, and Costs

§ 161.712 What are the penalties, damages, and costs payable by trespassers?

Trespassers on Navajo Partitioned Lands must pay the following penalties and costs:

(a) Collection of the value of the products illegally used or removed plus a penalty of double their values;

(b) Costs associated with any damage to Navajo Partitioned Lands and/or property;

(c) The costs associated with enforcement of the provisions, including field examination and survey, damage appraisal, investigation assistance and reports, witness expenses, demand letters, court costs, and attorney fees;

(d) Expenses incurred in gathering, impounding, caring for, and disposal of livestock in cases which necessitate impoundment under § 161.707; and

(e) All other penalties authorized by law.

§ 161.713 How will BIA determine the amount of damages to Navajo Partitioned Lands?

(a) BIA will determine the damages by considering the costs of rehabilitation and re-vegetation, loss of future revenue, loss of profits, loss of productivity, loss of market value, damage to other resources, and other factors.

(b) BIA will determine the value of forage or crops consumed or destroyed based upon the average rate received per

month for comparable property or grazing privileges, or the estimated commercial value or replacement costs of the products or property.

(c) BIA will determine the value of the products or property illegally used or removed based upon a valuation of similar products or property.

§ 161.714 How will BIA determine the costs associated with enforcement of the trespass?

Costs of enforcement may include detection and all actions taken by us through prosecution and collection of damages. This includes field examination and survey, damage appraisal, investigation assistance and report preparation, witness expenses, demand letters, court costs, attorney fees, and other costs.

§ 161.715 What will BIA do if a trespasser fails to pay penalties, damages and costs?

This section applies if a trespasser fails to pay the assessed penalties, damages, and costs as directed. Unless otherwise provided by applicable Navajo Nation law, BIA will:

(a) Refuse to issue the permittee a permit for use, development, or occupancy of Navajo Partitioned Lands; and

(b) Forward the case for appropriate legal action.

§ 161.716 How are the proceeds from trespass distributed?

Unless otherwise provided by Navajo Nation law:

(a) BIA will treat any amounts recovered under § 161.712 as proceeds from the sale of agricultural property from the Navajo Partitioned Lands upon which the trespass occurred.

(b) Proceeds recovered under § 161.712 may be distributed to:

(1) Repair damages of the Navajo Partitioned Lands and property; or

(2) Reimburse the affected parties, including the permittee for loss due to the trespass, as negotiated and provided in the permit.

(c) Reimburse for costs associated with the enforcement.

(d) If any money is left over after the distribution of the proceeds described in paragraph (b) of this section, BIA will return it to the trespasser or, where the owner of the impounded property cannot be identified within 180 days, the net proceeds of the sale will be deposited into the appropriate Navajo Nation account or transferred to the Navajo Nation under applicable tribal law.

§ 161.717 What happens if BIA does not collect enough money to satisfy the penalty?

BIA will send written notice to the trespasser demanding immediate settlement and advising the trespasser that unless settlement is received within 5 business days from the date of receipt, BIA will forward the case for appropriate legal action. BIA may send a copy of the notice to the Navajo Nation, permittee, and any known lien holders.

Subpart I—Concurrence/Appeals/Amendments

§ 161.800 How does the Navajo Nation to provide concurrence to BIA?

(a) Actions taken by BIA under this part require concurrence of the Navajo Nation under the Settlement Act.

(b) For any action requiring the concurrence of the Resource Committee, the following procedures will apply:

(1) Unless a longer time is specified in a particular section, or unless BIA grants an extension of time, the Resources Committee will have 45 days to review and concur with the proposed action;

(2) If the Resources Committee concurs in writing with all or part of BIA proposed action, the action or a portion of it may be immediately implemented;

(3) If the Resources Committee does not concur with all or part of the proposed action within the time prescribed in paragraph (b)(1) of this section, BIA will submit to the Resources Committee a written declaration of non-concurrence. BIA will then notify the Resources Committee in writing of a formal hearing to be held not sooner than 30 days from the date of the non-concurrence declaration;

(4) The formal hearing on non-concurrence will permit the submission of written evidence and argument concerning the proposal. BIA will take minutes of the hearing. Following the hearing, BIA may amend, alter, or otherwise change the proposed action. If, following a hearing, BIA alters or amends portions of the proposed plan of action, BIA will submit the altered or amended portions of the plan to the Resources Committee for its concurrence; and

(5) If the Resources Committee fails or refuses to give its concurrence to the proposal, BIA may implement the proposal only after issuing a written order, based upon findings of fact, that the proposed action is necessary to protect the land under the Settlement Act and the Agricultural Act.

§ 161.801 May decisions under this part be appealed?

(a) Appeals of BIA decisions issued under this part may be taken in accordance with procedures set out in part 2 of this title.

(b) All appeals of decisions by the Grazing Committee and Resource Committee will be forwarded to the appropriate hearing body of the Navajo Nation.

§ 161.802 How will the Navajo Nation recommend amendments to this part?

The Resources Committee will have final authority on behalf of the Navajo Nation to approve amendments to the Navajo Partitioned Lands grazing provisions, upon the recommendation of the Grazing Committee and the Navajo-Hopi Land Commission, and the concurrence of BIA.

[FR Doc. 03-28320 Filed 11-6-03; 4:32 pm]

BILLING CODE 4310-W7-P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, and 1926

[Docket No. H049C]

RIN 1218-AA05

Assigned Protection Factors

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed rule; notice of hearing.

SUMMARY: OSHA is convening an informal public hearing to receive testimony and documentary evidence on Assigned Protection Factors.

DATES: *Informal public hearing.* The Agency will hold the informal public hearing in Washington, DC beginning January 28, 2004. The hearing will commence at 10 a.m. on the first day, and at 9 a.m. on the second and subsequent days, which will be scheduled, if necessary.

Notice of Intention to Appear to provide testimony at the informal public hearing. Parties who intend to present testimony at the informal public hearing must notify OSHA in writing of their intention to do so no later than December 12, 2003. (Parties who submitted a Notice of Intention to Appear in response to the Notice of Proposed Rulemaking (NPRM) need not submit another notice.)

Hearing testimony and documentary evidence. Parties who are requesting more than 10 minutes to present their testimony or who will be submitting

documentary evidence at the hearing, must provide the Agency with copies of their full testimony and all documentary evidence they plan to present by January 12, 2004. (Parties who provided their full testimony and documentary evidence in response to the NPRM do not have to resubmit these materials.)

ADDRESSES: Informal public hearing.

The informal public hearing will be held in Washington, DC, in the Auditorium on the plaza level of the Frances Perkins Building, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC.

Notice of Intention to Appear at the hearing. Notices of Intention to Appear at the informal public hearing should be submitted in triplicate (3 copies) to the Docket Office, Docket No. H049C, Room N-2625, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. These notices also may be faxed to the Docket Office at (202) 693-1648, or submitted electronically at <http://ecomments.osha.gov>. OSHA Docket Office and Department of Labor hours of operation are 8:15 a.m. to 4:45 p.m.

Hearing testimony and documentary evidence. Testimony and documentary evidence must be submitted in triplicate (3 copies) to the Docket Office at the above address. Testimony and documentary evidence totaling 10 or fewer pages may be faxed to the Docket Office at 202-693-1647. Materials such as studies or journal articles may not be attached to faxed testimony or documentary evidence; instead, three copies of this material must be mailed to the Docket Office at the above address. Such material must identify clearly the name of the individual who is testifying, date, docket number, and subject so that OSHA can attach it to the appropriate faxed documents.

FOR FURTHER INFORMATION CONTACT: For general information and press inquiries, contact Ms. Layne Lathram, Office of Communications, Room N-3647, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 (telephone: (202) 693-1999). For technical inquiries, contact Mr. John Steelnack, Office of Biological Hazards, Room N-3718, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 (telephone: (202) 693-2289; fax: (202) 693-1678). For hearing information, contact Ms. Veneta Chatmon, Office of Communications, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 (telephone: (202) 693-1999). For additional copies of this **Federal Register** notice, contact the Office of

Publications, Room N-3103, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 (telephone: (202) 693-1888). Electronic copies of this **Federal Register** notice, as well as news releases and other relevant documents, are available at OSHA's homepage at <http://www.osha.gov>.

SUPPLEMENTARY INFORMATION: OSHA published the final, revised Respiratory Protection Standard, 29 CFR 1910.134, on January 8, 1998 (63 FR 1152). However, in the final standard, the Agency reserved the sections related to assigned protection factors (APFs) and maximum use concentrations (MUCs) pending further rulemaking (see 63 FR 1182 and 1203). On June 6, 2003, OSHA published an NPRM to revise its existing Respiratory Protection Standard to add definitions and specific requirements for APFs and MUCs (68 FR 34036). The proposed revisions also would supersede the respirator-selection provisions of existing substance-specific standards with the new APFs (except the APFs for the 1,3-Butadiene Standard).

During the comment period on the NPRM, which OSHA extended to October 2, 2003 (68 FR 53311), a number of commenters (Exs. 12-2, 12-4, 12-8, 12-10, 12-11, 12-12, 13-1, 13-2, 13-3, 13-4, 13-5) requested an informal public hearing. OSHA is granting this request.

The Agency is placing the Notices of Intention to Appear, hearing testimony, and documentary evidence in the rulemaking docket, which will be available for inspection and copying at the OSHA Docket Office.

Public Participation Comments and Hearings

OSHA encourages members of the public to participate in this rulemaking by providing oral testimony and documentary evidence at the informal public hearing. Accordingly, the Agency invites interested parties having knowledge of, or experience with, the issues raised in the NPRM to participate in this process, and welcomes any pertinent data that will provide the Agency with the best available evidence to use in developing the final rule. This section describes the procedures the public must use to schedule an opportunity to deliver oral testimony and to provide documentary evidence at the informal public hearing.

Hearing Arrangements

Pursuant to section 6(b)(3) of the Occupational Safety and Health Act ("the Act"; 29 U.S.C. 655), members of the public must have an opportunity at

the informal public hearing to provide oral testimony concerning the issues raised in the NPRM. An administrative law judge (ALJ) will preside over the hearing, and will resolve any procedural matters relating to the hearing on the first day.

Purpose of the Hearing

The legislative history of Section 6 of the Act, as well as the Agency's regulation governing public hearings (29 CFR 1911.15), establish the purpose and procedures of informal public hearings. Although the presiding officer of the hearing is an ALJ, and questions by interested parties are allowed on pertinent issues, the hearing is informal and legislative in purpose. Therefore, the hearing provides interested parties with an opportunity to make effective and expeditious oral presentations in the absence of procedural restraints that could impede or protract the rulemaking process. The hearing is not an adjudicative proceeding subject to the technical rules of evidence; instead, it is an informal administrative proceeding convened for the purpose of gathering and clarifying information. The regulations that govern the hearing, and the pre-hearing guidelines issued for the hearing, will ensure that participants are treated fairly and have due process; this approach will facilitate the development of a clear, accurate, and complete record. Accordingly, application of these rules and guidelines will be such that questions of relevance, procedures, and participation will be decided in favor of developing a complete record.

Conduct of the Hearing

Conduct of the hearing will conform to the provisions of 29 CFR part 1911 ("Rules of Procedure for Promulgating, Modifying, or Revoking Occupational Safety and Health Standards"). Although the ALJ who presides over the hearing makes no decision or recommendation on the merits of the NPRM or the final rule, the ALJ has the responsibility and authority to ensure that the hearing progresses at a reasonable pace and in an orderly manner. To ensure that interested parties receive a full and fair informal hearing, the ALJ has the authority and power to: Regulate the course of the proceedings; dispose of procedural requests, objections, and similar matters; confine the presentations to matters pertinent to the issues raised; use appropriate means to regulate the conduct of the parties who are present at the hearing; question witnesses; and permit others to question witnesses; and limit the time for such questions. At the close of the hearing, the ALJ will

establish a post-hearing comment period for parties who participated in the hearing. During the first part of this period, the participants may submit additional data and information to OSHA, and during the second part of this period, they may submit briefs, arguments, and summations.

Notice of Intention To Appear To Provide Testimony at the Informal Public Hearings

Hearing participants must file a Notice of Intention to Appear that provides the following information: The name, address, and telephone number of each individual who will provide testimony; the capacity (e.g., name of the establishment/organization the individual is representing; the individual's occupational title and position) in which the individual will testify; approximate amount of time requested for the individual's testimony; specific issues the individual will address, including a brief description of the position that the individual will take with respect to each of these issues; and any documentary evidence the individual will present, including a brief summary of the evidence.

OSHA emphasizes that, while the hearing is open to the public and interested parties are welcome to attend, only a party who files a proper Notice of Intention to Appear may ask questions and participate fully in the hearing. A party who did not file a Notice of Intention to Appear may be allowed to testify at the hearing if time permits, but this determination is at the discretion of the presiding ALJ.

Hearing Testimony and Documentary Evidence

The Agency will review each submission and determine if the information it contains warrants the amount of time requested. OSHA then will allocate an appropriate amount of time to each presentation, and will notify the participants of the time allotted to their presentations. Prior to the hearing, the Agency will notify the participant if the allotted time is less than the requested time, and will provide the reasons for this action. OSHA may limit to 10 minutes the presentation of any participant who fails to comply substantially with these procedural requirements. The Agency may also request a participant to return for questions at a later time.

Certification of the Record and Final Determination After the Informal Public Hearing

Following the close of the hearing and post-hearing comment period, the ALJ

will certify the record to the Assistant Secretary of Labor for Occupational Safety and Health. This record will consist of all of the written comments, oral testimony, documentary evidence, and other material received during the hearing. Following certification of the record, OSHA will review the proposed provisions in light of all the evidence received as part of the record, and then will issue the final determinations based on the entire record.

Authority

John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, directed the preparation of this document. It is issued under Section 6(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655), Secretary of Labor's Order No. 5-2002 (67 FR 65008), and 29 CFR part 1911.

Signed at Washington, DC on November 6, 2003.

John L. Henshaw,

Assistant Secretary of Labor.

[FR Doc. 03-28357 Filed 11-10-03; 8:45 am]

BILLING CODE 4510-26-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[COTP San Francisco Bay 03-002]

RIN 1625-AA00

Security Zones; San Francisco Bay, California

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish moving and fixed security zones extending 100 yards around and under all High Interest Vessels (HIVs) located in the San Francisco Bay and Delta ports, California. These security zones are necessary security measures and are intended to protect the public and ports from potential subversive acts. Entry into these security zones would be prohibited, unless specifically authorized by the Captain of the Port San Francisco Bay, or his designated representative.

DATES: Comments and related material must reach the Coast Guard on or before January 12, 2004.

ADDRESSES: You may mail comments and related material to the Waterways Management Branch, U.S. Coast Guard

Marine Safety Office San Francisco Bay, Coast Guard Island, Alameda, California 94501. The Waterways Management Branch maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the Waterways Management Branch between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Doug Ebberts, Waterways Management Branch, U.S. Coast Guard Marine Safety Office San Francisco Bay, (510) 437-3073.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (COTP San Francisco Bay 03-002), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know that your submission reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to the Waterways Management Branch at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a separate notice in the **Federal Register**.

Background and Purpose

Since the September 11, 2001 terrorist attacks on the World Trade Center in New York, the Pentagon in Arlington, Virginia and Flight 93, the Federal Bureau of Investigation (FBI) has issued several warnings concerning the potential for additional terrorist attacks within the United States. In addition, the ongoing hostilities in Afghanistan and Iraq have made it prudent to U.S. ports to be on a higher state of alert because Al-Qaeda and other organizations have declared an ongoing

intention to conduct armed attacks on U.S. interests worldwide.

In its effort to thwart terrorist activity, the Coast Guard has increased safety and security measures on U.S. ports and waterways. As part of the Diplomatic Security and Antiterrorism Act of 1986 (Pub. L. 99-399), Congress amended section 7 of the Ports and Waterways Safety Act (PWSA), 33 U.S.C. 1226, to allow the Coast Guard to take actions, including the establishment of security and safety zones, to prevent or respond to acts of terrorism against individuals, vessels or public or commercial structures.

The Coast Guard also has authority to establish security zones pursuant to the Act of June 15, 1917, as amended by the Magnuson Act of August 9, 1950 (50 U.S.C. 191 *et seq.*) and implementing regulations promulgated by the President in subparts 6.01 and 6.04 of part 6 of title 33 of the Code of Federal Regulations.

In this particular proposed rulemaking, to address the aforementioned security concerns and to take steps to prevent the catastrophic impact that a terrorist attack against a High Interest Vessel (HIV) would have on the public interest, the Coast Guard is proposing to establish permanent security zones around and under HIVs entering, departing, moored or anchored within the San Francisco Bay and Delta ports. These security zones would help the Coast Guard prevent vessels or persons from engaging in terrorist actions against HIVs. Due to these heightened security concerns and the catastrophic impact a terrorist attack on an HIV would have on the crew and passengers on board and surrounding communities, security zones are prudent for these types of vessels.

On February 10, 2003, we issued a rule under docket COTP San Francisco Bay 03-002 and published this rule in the **Federal Register** (68 FR 9003, February 27, 2003) creating temporary section 165.T11-077 of Title 33 of the Code of Federal Regulations (CFR). Under temporary section 165.T11-077, the Coast Guard established 100-yard moving and fixed security zones around all HIVs that are anchored, moored or underway within the San Francisco Bay and Delta ports.

Though temporary section 165.T11-077 expired at 11:59 p.m. P.s.t. on May 31, 2003, it was effectively and seamlessly extended by a change in effective period temporary rule that was issued on May 19, 2003. This change in the effective period of the temporary rule is found under docket COTP San Francisco Bay 03-002 and was published in the **Federal Register** (68

FR 32368, May 30, 2003), under the same previous temporary section 165.T11-077, and extended the rule to 11:59 p.m. P.d.t. on September 30, 2003. On September 11, 2003, a second change in effective period temporary rule was issued, under docket COTP San Francisco Bay 03-002 and was published (68 FR 55445, September 26, 2003), under the same previous temporary section 165.T11-077, further extending the rule to 11:59 p.m. P.s.t. on March 31, 2004. The Captain of the Port has determined there is a need for continued security regulations exists.

We propose to create permanent security zones in the same areas currently protected by temporary security zones under § 165.T11-077. Our proposed rule would amend § 165.1183, Security Zones; Cruise Ships and Tank Vessels, San Francisco Bay and Delta ports, California (see 67 FR 79856, December 31, 2002), which contains permanent security zones for cruise ships and tank vessels. In this NPRM, the Coast Guard is proposing to amend § 165.1183 to include HIVs as protected vessels along with cruise ships and tank vessels. The Coast Guard will utilize the extended effective period of the § 165.T11-077 to engage in notice and comment rulemaking to develop permanent regulations tailored to the present and foreseeable security environment with the Captain of the Port (COTP) San Francisco Bay.

Discussion of Proposed Rule

The Coast Guard proposes to establish moving and fixed security zones around all HIVs that are anchored, moored or underway within the San Francisco Bay and Delta ports. These security zones are activated when any HIV passes shoreward of the line drawn between San Francisco Main Ship Channel buoys 7 and 8 (LLNR 4190 & 4195, positions 37°46.9' N, 122°35.4' W & 37°46.5' N, 122°35.2' W, respectively) and remains in effect while the vessel is underway, anchored or moored within in the San Francisco Bay and Delta ports. When activated, this security zone would encompass all waters, extending from the surface to the sea floor, within 100 yards ahead, astern and extending 100 yards along either side of any HIV in the San Francisco Bay and Delta ports.

This security zone is automatically deactivated when the HIV passes seaward of the line drawn between San Francisco Main Ship Channel buoys 7 and 8 (LLNR 4190 & 4195, positions 37°46.9' N, 122°35.4' W & 37°46.5' N, 122°35.2' W, respectively) on its departure from port. Vessels and people may be allowed to enter an established security zone on a case-by-case basis

with authorization from the Captain of the Port.

These security zones are needed for national security reasons to protect HIVs, the public, transiting vessels, adjacent waterfront facilities and the ports from potential subversive acts, accidents or other events of a similar nature. Entry into these zones would be prohibited unless specifically authorized by the Captain of the Port or his designated representative.

Vessels or persons violating this section would be subject to the penalties set forth in 33 U.S.C. 1232 and 50 U.S.C. 192. Pursuant to 33 U.S.C. 1232, any violation of the security zone described herein, is punishable by civil penalties (not to exceed \$27,500 per violation, where each day of a continuing violation is a separate violation), criminal penalties (imprisonment up to 6 years and a maximum fine of \$250,000) and in rem liability against the offending vessel. Any person who violates this section using a dangerous weapon or who engages in conduct that causes bodily injury or fear of imminent bodily injury to any officer authorized to enforce this regulation, also faces imprisonment up to 12 years. Vessels or persons violating this section are also subject to the penalties set forth in 50 U.S.C. 192: seizure and forfeiture of the vessel to the United States, a maximum criminal fine of \$10,000, and imprisonment up to 10 years.

The Captain of the Port would enforce these zones and may enlist the aid and cooperation of any Federal, State, county, municipal and private agency to assist in the enforcement of the regulation. This regulation is proposed under the authority of 33 U.S.C. 1226 in addition to the authority contained in 50 U.S.C. 191 and 33 U.S.C. 1231.

Regulatory Evaluation

This proposed rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security (DHS).

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Although this proposed rule restricts access to the waters encompassed by the security zones, the effect of this proposed rule

would not be significant because: (i) The zones would encompass only a small portion of the waterway; (ii) vessels would be able to pass safely around the zones; (iii) vessels may be allowed to enter these zones on a case-by-case basis with permission of the Captain of the Port, or his designated representative; and (iv) vessels are able to safely transit around the zones while a vessel is moored or at anchor in the San Francisco Bay and Delta ports.

The size of the proposed zones are the minimum necessary to provide adequate protection for HIVs, their crews and passengers, other vessels operating in the vicinity of HIVs, adjoining areas and the public. The entities most likely to be affected are commercial vessels transiting the main ship channel en route to the San Francisco Bay and Delta ports and pleasure craft engaged in recreational activities and sightseeing. The proposed security zones would prohibit any commercial vessels from meeting or overtaking an HIV in the main ship channels, effectively prohibiting use of the channels. However, the moving security zones would only be effective during HIV transits, which would last for approximately 30 minutes.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. We expect this proposed rule may affect owners and operators of private and commercial vessels, some of which may be small entities, intending to transit or anchor in the small portions of the waterway that are affected by these security zones. The proposed security zones would not have a significant economic impact on a substantial number of small entities for several reasons: Vessel traffic can pass safely around the area and vessels engaged in recreational activities, sightseeing and commercial fishing have ample space outside of the security zones to engage in these activities. When a HIV is at anchor, vessel traffic would have ample room to maneuver around the security zones. Small

entities and the maritime public would be advised of these security zones via public notice to mariners.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (*see ADDRESSES*) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Lieutenant Doug Ebbers, Waterways Management Branch, U.S. Coast Guard Marine Safety Office San Francisco Bay, (510) 437–3073.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this proposed rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental

Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a “significant energy action” under that order because it is not a “significant regulatory action” under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.ID, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental

documentation because we are establishing a security zone.

A draft "Environmental Analysis Check List" and a draft "Categorical Exclusion Determination" (CED) are available in the docket where indicated under **ADDRESSES**. Comments on this section will be considered before we make the final decision on whether the rule should be categorically excluded from further environmental review.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Revise § 165.1183 to read as follows:

§ 165.1183 Security Zones; Cruise Ships, Tank Vessels and High Interest Vessels, San Francisco Bay and Delta ports, California.

(a) *Definitions.* As used in this section—

(1) *Cruise ship* means a passenger vessel, except for a ferry, over 100 feet in length, authorized to carry more than 12 passengers for hire; making voyages lasting more than 24 hours, any part of which is on the high seas; and for which passengers are embarked or disembarked in the San Francisco Bay and Delta ports.

(2) *Tank vessel* means any self-propelled tank ship that is constructed or adapted primarily to carry oil or hazardous material in bulk as cargo or cargo residue in the cargo spaces. The definition of tank ship does not include tank barges.

(3) *High Interest Vessel* or *HIV* means any vessel deemed by the Captain of the Port or higher authority as a vessel requiring protection based upon risk assessment analysis of the vessel and is therefore escorted by a Coast Guard or other law enforcement vessel with an embarked Coast Guard commissioned, warrant, or petty officer.

(b) *Location.* The following areas are security zones:

(1) *Zones for anchored vessels.* All waters, extending from the surface to

the sea floor, within 100 yards ahead, astern and extending 100 yards along either side of any cruise ship, tank vessel or HIV that is anchored at a designated anchorage within the San Francisco Bay and Delta port areas shoreward of the line drawn between San Francisco Main Ship Channel buoys 7 and 8 (LLNR 4190 & 4195, positions 37°46.9' N, 122°35.4' W and 37°46.5' N, 122°35.2' W, respectively);

(2) *Zones for moored or mooring vessels.* The shore area and all waters, extending from the surface to the sea floor, within 100 yards ahead, astern and extending 100 yards along either side of any cruise ship, tank vessel or HIV that is moored, or in the process of mooring, at any berth within the San Francisco Bay and Delta port areas shoreward of the line drawn between San Francisco Main Ship Channel buoys 7 and 8 (LLNR 4190 & 4195, positions 37°46.9' N, 122°35.4' W and 37°46.5' N, 122°35.2' W, respectively); and

(3) *Zones for vessels underway.* All waters of the San Francisco Bay and Delta port areas, extending from the surface to the sea floor, within 100 yards ahead, astern and extending 100 yards along either side of any cruise ship, tank vessel or HIV that is underway shoreward of the line drawn between San Francisco Main Ship Channel buoys 7 and 8 (LLNR 4190 & 4195, positions 37°46.9' N, 122°35.4' W and 37°46.5' N, 122°35.2' W, respectively).

(c) *Regulations.* (1) In accordance with the general regulations in § 165.33 of this part, entry into or remaining in this zone is prohibited unless authorized by the Coast Guard Captain of the Port, San Francisco Bay, or his designated representative.

(2) Persons desiring to transit the area of the security zone may contact the Captain of the Port at telephone number 415–399–3547 or on VHF–FM channel 16 (156.8 MHz) to seek permission to do so. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port or his or her designated representative.

(3) When a cruise ship, tank vessel or HIV approaches within 100 yards of a vessel that is moored, or anchored, the stationary vessel must stay moored or anchored while it remains within the cruise ship, tank vessel or HIV's security zone unless it is either ordered by, or given permission from, the COTP San Francisco Bay to do otherwise.

(d) *Authority.* In addition to 33 U.S.C. 1231, the authority for this section includes 33 U.S.C. 1226.

(e) *Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the security zone by local law enforcement as necessary.

Dated: October 24, 2003.

Gerald M. Swanson,

Captain, U.S. Coast Guard, Captain of the Port, San Francisco Bay, California.

[FR Doc. 03–28329 Filed 11–10–03; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 355

[FRL–7585–4]

RIN 2050–AE42

Emergency Planning and Community Right-to-Know Act; Extremely Hazardous Substances List; Proposed Deletion of Phosmet

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to delete phosmet from the list of extremely hazardous substances (EHS) under the Emergency Planning and Community Right to Know Act (EPCRA). EPA is proposing this change in response to a petition submitted by the registrant of the pesticide in which they argue that phosmet should be removed from the EHS list because there are no valid data that indicate the chemical meets the listing criteria. Facilities with phosmet on-site would no longer be required to comply with State Emergency Response Commission (SERC) and Local Emergency Planning Committee (LEPC) requirements for the chemical phosmet. In addition, facilities with phosmet would no longer have to file an emergency and hazardous chemical inventory form and Material Safety Data Sheet (MSDS) under EPCRA for phosmet with their SERC, LEPC and local fire department for amounts less than 10,000 pounds.

DATES: *Comments:* Comments must be submitted on or before January 12, 2004.

ADDRESSES: Comments may be submitted electronically, or through hand delivery/courier or by mail. Send an original and two copies of your comments to: SUPERFUND Docket Information Center, Environmental Protection Agency, Mailcode: 5305T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460, Attention Docket ID No. SFUND–2003–0007. Follow the detailed instructions as provided in the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: For general information, contact the

Emergency Planning and Community Right-to-Know Hotline at 800-424-9346 or TDD 800-553-7672 (hearing impaired). In the Washington, DC, metropolitan area, call 703-412-9810 or TDD 703-412-3323. For more detailed information on specific aspects of this rulemaking, contact Kathy Franklin, phone 202-564-7987; email: franklin.kathy@epa.gov

SUPPLEMENTARY INFORMATION:

I. Does This Notice Apply to Me?

A. Affected Entities: Entities that would be affected by this section are those organizations and facilities subject to 40 CFR part 355—Emergency Planning and Emergency Release Notification Requirements and 40 CFR part 370—Hazardous Chemical Reporting. To determine whether your facility is affected by this action, you should carefully examine the applicability provisions at 40 CFR part 355 and 40 CFR part 370. Entities potentially affected by this action are facilities that distribute phosmet as a pesticide for commercial use and farms that store, handle and apply phosmet to variety of fruit, nut, and field crops. If you have any questions regarding the applicability of this action to a particular entity, consult the person(s) listed in the **FOR FURTHER INFORMATION CONTACT** section.

II. How Can I Get Copies of This Document and Other Related Information?

Docket. EPA has established an official docket for this action under Docket ID No. SFUND-2003-0007. The official docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The public docket is the collection of materials that is available for public viewing at SUPERFUND Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the SUPERFUND Docket is (202) 566-0270. You may copy up to 100 pages from any regulatory document at no cost. Additional copies are \$0.15 per page.

Electronic Access. You may access this **Federal Register** document electronically through the EPA Internet under the “**Federal Register**” listings at <http://www.epa.gov/fedrgstr>.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to submit or view public comments, access the index listing of the contents of the public docket, and access those documents in the public docket that are available electronically. Once in the system, select “search,” then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility. EPA intends to work toward providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public

docket along with a brief description written by the docket staff.

For additional information about EPA's electronic public docket visit EPA Dockets online or see 67 FR 38102, May 31, 2002.

III. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked “late.” EPA is not required to consider these late comments.

Electronically. If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at <http://www.epa.gov/edocket>, and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, select “Information Sources,” “Dockets,” and “EPA Dockets.” Once in the system, select “search,” and then key in Docket ID No. SFUND-2003-0007. The system is an “anonymous access” system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

Comments may be sent by electronic mail (e-mail) to superfund.docket@epa.gov, Attention Docket ID No. SFUND-2003-0007. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

You may submit comments on a disk or CD ROM that you mail to the mailing address identified in the following paragraph. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

By Mail. Send an original and two copies of your comments to: SUPERFUND Docket Information Center, U.S. Environmental Protection Agency, Mailcode: 5305T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460, Attention Docket ID No. SFUND-2003-0007.

By Hand Delivery or Courier. Deliver your comments to: SUPERFUND Docket Information Center (EPA/DC) EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. Attention Docket ID No. SFUND-2003-0007. Such deliveries are only accepted during the Docket's normal hours of operation as identified in the "How Can I Get Copies of This Document and Other Related Information?" section.

IV. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be confidential business information (CBI) electronically through EPA's electronic public docket or by e-mail. Send or deliver information identified as CBI only to the following address: SUPERFUND CBI Document Control Officer (5305T), U.S. EPA, 1200 Pennsylvania Avenue, NW., Washington, D.C. 20460, Attention Docket ID No. SFUND-2003-0007. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR, Part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

V. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at your estimate.
5. Provide specific examples to illustrate your concerns.
6. Offer alternatives.
7. Make sure to submit your comments by the comment period deadline identified.
8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

I. Introduction and Background

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I. Introduction and Background

A. Statutory Authority

This proposed rule is issued under sections 302 and 328 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA).

B. Background

On October 17, 1986, the President signed into law the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99-499 (1986). Title III of SARA established a program designed to require state and local planning and preparedness for spills or releases of hazardous substances and to provide the public and local governments with information concerning potential chemical hazards in their communities. This program is codified as the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. 11001-11050.

Subtitle A of EPCRA establishes the framework for local emergency planning. The statute requires that EPA publish a list of "extremely hazardous substances" (EHSs). The EHS list was established by EPA to identify chemical substances which could cause serious irreversible health effects from accidental releases (51 FR 13378). EPA had previously published this list as the list of acutely toxic chemicals in November 1985, in Appendix A of the Chemical Emergency Preparedness Program Interim Guidance (CEPP Guidance). The Agency was also directed to establish "threshold planning quantities" (TPQs) for each extremely hazardous substance.

Under EPCRA section 302, a facility which has on-site an EHS in excess of its TPQ must notify the State Emergency Response Commission (SERC) and Local Emergency Planning Committee (LEPC) as well as participate in local emergency planning activities. The facility must also report accidental releases in excess of the Reportable Quantity (RQ) to the LEPC and SERC. Under EPCRA section 311 and 312, some facilities with phosmet on-site in excess of its TPQ are required to submit an emergency and

hazardous chemical inventory form and Material Safety Data Sheet (MSDS) required for phosmet with their SERC, LEPC and local fire department. However, facilities that apply phosmet to crops as a pesticide, do not have to file the inventory form or MSDS because chemicals that are used at facilities in routine agricultural operations are not included as hazardous chemicals subject to the reporting requirements.

The purpose of the extremely hazardous substance list is to focus initial efforts in the development of State and local contingency plans. Inclusion of a chemical on the EHS list does not mean state or local communities should ban or otherwise restrict use of a listed chemical. Rather, such identification indicates a need for the community to undertake a program to investigate and evaluate the potential for accidental exposure associated with the production, storage or handling of the chemical at a particular site.

1. Regulatory Background

The list of extremely hazardous substances and their threshold planning quantities are codified in 40 CFR part 355, Appendices A & B. EPA first published the EHS list and TPQs along with the methodology for determining threshold planning quantities as an interim final rule on November 17, 1986 (51 *FR* 41573–41579 and 41580). In the final rule, EPA made a number of revisions to the interim final rule (52 *FR* 13387, April 22, 1987). Among other things, the final rule republished the EHS list, with the addition of four new chemicals and revised the methodology for determining some TPQs. Details of the methodology used to determine whether to list a substance as an extremely hazardous substance and for deriving the threshold planning quantities are found in the November 1986 and April 1987 **Federal Register** notices and in technical support documents in the rulemaking records. These records are found in Superfund Docket No. 300PQ.

EPA has since received a number of petitions to amend the EHS list. To date, 46 chemicals have been delisted from the EHS list in previous rulemakings because they did not meet the toxicity criteria for the list and were originally listed under section 302 in error.

2. Gowan's Petition to Delist Phosmet

EPA received a petition dated August 8, 1996 from Gowan Company to delete the chemical phosmet from the EHS list under Section 302 of EPCRA. Gowan believes that listing of phosmet was based on an inappropriate toxicity study and argues that phosmet should be

removed from the EHS list because there are no valid data that indicate the chemical meets the listing criteria.

Phosmet (O,O-dimethyl-S-phthalimidomethylphosphorodithioate, CAS No. 732–11–6) is a pink to white crystalline solid with chemical formula $C_{11}H_{12}NO_4PS_2$. It is slightly soluble in water and has a relatively low vapor pressure. It is a non-systemic organophosphate insecticide used for agricultural crop protection in fruit, nut and certain field crops. It is also used on trees and ornamental plants. According to EPA's Office of Pesticide Programs (OPP), approximately 1,250,000 pounds active ingredient (a.i.) of phosmet are used annually. Technical grade phosmet contains approximately 94% phosmet. Products containing phosmet can be in the form of dusts, emulsifiable concentrates, soluble concentrates, and wettable powders and can contain varying amounts of the active ingredient phosmet. More information on phosmet can be found in the February 2003 Technical Background Document: Proposed Rule to Delist Phosmet from the EHS List, available in the docket.

II. The EHS Listing Criteria

As previously described, in November 1985, EPA published a list of substances in Appendix A of the "Chemical Emergency Preparedness Program Interim Guidance." Under section 302(a) of EPCRA, Congress required EPA to adopt that same list as the EHS list. Appendix A defines the list of chemicals as those "for which an acute toxicity measure has a value meeting the criteria stated in Chapter 6" of the November 1985 Interim Guidance. The listing criteria discussed in Chapter 6 are the same criteria referenced and discussed in EPA's interim final and final rules establishing the EHS list. Those criteria contain two sets of numerical acute toxicity measures. For purposes of clarification in today's rulemaking, EPA will refer to the two sets of numerical acute toxicity criteria as the primary listing criteria and the secondary listing criteria. In developing these criteria, the Agency presumed that humans may be as sensitive as the most sensitive mammalian species tested.

A. Primary Listing Criteria

The primary acute toxicity criteria are, based on data from mammalian testing:

Inhalation $LC_{50} \leq 0.5$ milligrams per liter of air (mg/L) (for exposure time ≤ 8 hours), or
 Dermal $LD_{50} \leq 50$ milligrams per kilogram of body weight (mg/kg), or
 Oral $LD_{50} \leq 25$ milligrams per kilogram of body weight (mg/kg)

LC_{50} is the median lethal concentration, defined as the concentration level at which 50 percent of the test animals died when exposed by inhalation for a specified time period.

LD_{50} is the median lethal dose, defined as the dose at which 50 percent of the test animals died during exposure.

B. Secondary Listing Criteria

EPA included on the EHS list other chemicals that did not meet the primary acute toxicity criteria. These were added based on the secondary acute toxicity criteria below as well as the following factors: Large volume production and known risk, as indicated by the fact that some of the chemicals have caused death and injury in accidents.

The secondary acute toxicity criteria are, based on data from mammalian testing:

Inhalation $LC_{50} \leq 2$ mg/L for exposure time of ≤ 8 hours, or

Dermal $LD_{50} \leq 400$ mg/kg or

Oral $LD_{50} \leq 200$ mg/kg

The chemical with the lowest production volume that was included as an EHS based on the secondary criteria and high production volume, had an annual production volume of 30 million pounds. In addition to high production chemicals meeting these criteria, several other chemicals slightly less toxic than the secondary criteria, were listed because of their recognized toxicity as a chemical of concern or known hazard; for example several of them have caused death or injury in accidents.

The selection criteria were designed as screening tools to identify highly acute toxic chemicals. The specific values chosen are recognized by the scientific community as indicating a high potential for acute toxicity, and chemicals meeting the toxicity criteria are considered potentially hazardous. Even with the amount of animal data that are available, some chemicals have no standard acute toxicity test data.

In choosing chemicals for the EHS list, EPA matched the criteria against all mammalian test data for all chemicals. A chemical was identified as acutely toxic according to these criteria if mammalian acute toxicity data for any one of the three routes of administration was equal to or less than the numerical criteria specified for that route. The Agency used LC_{LO} or LD_{LO} data for a chemical in cases where median lethal concentration or dose (LC_{50} or LD_{50}) were not available. The lethal concentration low (LC_{LO}) and the lethal dose low (LD_{LO}) are the lowest concentration in air or the lowest dose

in milligrams of chemical per kilogram of body weight, respectively, at which any test animals died. These values may be more variable than those provided from median lethality tests, but for the purposes of screening large numbers of chemicals, it was deemed necessary to provide a second level screening tool in preference to missing potentially toxic chemicals because they were not adequately tested. For inhalation data, the Agency chose to use LC₅₀ and LC_{LO} values with exposure periods up to eight hours or even with no reported exposure period. EPA recognized that this was a conservative approach, but did not want to miss any acutely toxic chemical of concern.

The Agency also used lethality data from the most sensitive mammalian species and not only those from rats because it was not possible to predict which species is the appropriate surrogate for humans for a given chemical. In addition, because populations are heterogeneous and individuals are expected to vary considerably in their sensitivity to chemical substances, the Agency assumed that humans may be as sensitive as the most sensitive mammalian species tested.

C. Toxicity Data Sources

When the initial list was developed, the Agency used acute toxicity data from the Registry of Toxic Effects of Chemical Substances (RTECS), maintained by the National Institute of Occupational Safety and Health (NIOSH). The RTECS data was compared with the EHS listing toxicity criteria (both primary and secondary). The RTECS data base was used as the principal source of toxicity data for identifying acutely toxic chemicals because it represents the most comprehensive repository of acute toxicity information available with basic toxicity information and other data on more than 79,000 chemicals. Although RTECS is not formally peer-reviewed, data from RTECS is widely accepted and used as a toxicity data source by industry and regulatory agencies alike. The data presented are from scientific literature which has been edited by the scientific community before publication.

III. Proposed Modification of EHS List

A. Basis of Phosmet Listing

Phosmet was originally listed on the EHS list because a four-hour rat inhalation LC₅₀ of 0.054 mg/L, reported in the 1985 RTECS database, met the EHS primary toxicity inhalation criteria of LC₅₀ ≤ 0.5 mg/L. The value in RTECS

was cited from a 1982 Russian publication, which was a compilation of toxicity data for many chemicals.

The TPQ for phosmet depends on its physical state. As a solid, phosmet has a TPQ of 10 pounds if it: (1) Is a powder with particle size less than 100 microns, (2) is in molten form, (3) is in solution, or (4) has a National Fire Protection Association (NFPA) reactivity rating of 2, 3, or 4. Otherwise, the TPQ for phosmet is 10,000 pounds.

B. Gowan's Phosmet Petition

Gowan Company of Yuma, Arizona submitted to EPA a petition dated August 8, 1996 requesting that EPA remove phosmet from the EHS list because it does not meet the toxicity criteria. During EPA's review of the petition, Gowan submitted additional toxicity data and other information. EPA also reviewed acute toxicity data for phosmet previously submitted to EPA's Office of Pesticide Programs (OPP) for the registration of phosmet as a pesticide. Gowan argued that the inhalation LC₅₀ (rat) value of 0.054 mg/liter/4 hours, as cited in RTECS, is unverifiable because the experimental details, study protocol, and quality control procedures are unavailable. Without these experimental details, Gowan maintained that it is impossible to reconstruct and validate the original experiment. In addition, Gowan asserted that this LC₅₀ value is inconsistent with all other available inhalation toxicity data for technical grade (95% purity or higher) phosmet. Gowan also asserted that the phosmet technical grade does not meet the toxicity criteria for listing as an EHS following exposure by the oral or dermal routes, as indicated by a number of experimental studies. Gowan submitted with their petition data from a number of acute inhalation toxicity tests which they believe show that phosmet technical poses a low risk of acute toxicity by inhalation, as indicated by the absence of mortality when test animals were exposed to phosmet vapor or dust. Gowan also claimed that the toxicity studies on phosmet formulations, including wettable powders and liquid formulations, indicate that these phosmet products do not meet the criteria for the EHS list.

Because phosmet is not a high production chemical (less than 2 million pounds annually), EPA focused its efforts on evaluating whether the existing toxicity data meets the primary listing criteria. In addition to the phosmet toxicity data submitted by Gowan and available data from OPP, EPA found data from acute mouse oral toxicity studies identified from a search

of toxicity databases and literature. In July 2001, Gowan supplied EPA with data from five acute oral mouse studies and EPA obtained a journal article on an acute mouse oral toxicity study conducted by the National Center for Toxicological Research (NCTR) of the Food and Drug Administration (FDA). More details of the phosmet toxicity studies and their evaluation can be found in the February 2003 Technical Background Document: Proposed Rule to Delist Phosmet from the EHS List available in the public docket.

C. Review of Phosmet Acute Toxicity Data

1. Phosmet Acute Inhalation Toxicity

The four-hour rat inhalation LC₅₀ of 0.054 mg/L, reported in 1985 RTECS was cited from a Russian publication (Izmerov *et al.* 1982. Toxicometric Parameters of Industrial Toxic Chemical Under Single Exposure) which contained compiled toxicity values for many chemicals, but no study details. In both the Russian and English translation version of this document, the chemical structure given for phosmet is incorrect, which led Gowan to assert that there was some uncertainty as to whether the chemical being tested was indeed phosmet. EPA was not able to obtain the actual phosmet toxicity study conducted by a Russian researcher L.P. Danilenko, but was able to obtain a translation of a Russian 1969 journal article by Danilenko that discussed the rat inhalation study and the results. Based on the chemical name and chemical synonyms (O,O-dimethyl-phthalimidio-methyl-dithiophosphate or phthalophos) used in (Danilenko 1969), EPA believes the chemical being tested was indeed phosmet. No chemical structure was given in the article.

In Danilenko (1969), the following acute toxicity results were reported for phthalophos, also known as Imidan or phosmet: a four-hour rat inhalation LC₅₀ of 54 mg/m³ (0.054 mg/L); a four-hour rat inhalation LC_{LO} of 31 mg/m³ (0.031 mg/L); and a four-hour cat inhalation LC_{LO} of 65 mg/m³ (0.065 mg/L). The tests were performed using an aqueous emulsion of phthalophos (phosmet) on albino rats and cats. The animals were exposed to a liquid aerosol produced by atomization of the preparation with a special sprayer (Boitenko). The concentration of phthalophos (phosmet) in the chamber air was determined by a thin-layer chromatographic method.

However, the Danilenko (1969) article severely lacks key details of the experimental methods, such as the purity of phosmet, extent of animal

body exposure, possibility of other routes of exposure, specific emulsion components and their toxicity. The phosmet used in the experiment was manufactured in the Union of Soviet Socialist Republics (USSR) by a research institute using an unknown method. With the number of unanswered key questions regarding the experimental protocol, EPA has determined that the results in this paper are insufficient to provide the basis for the continued listing of phosmet on the EHS list.

EPA evaluated more than 20 other inhalation studies of technical grade phosmet ($\geq 94\%$ phosmet) and other phosmet formulations, such as wettable powders and emulsions. The testing exposure routes included vapor, particulates and aerosols. Only three of these inhalation studies produced any mortality. The LC_{50} data from these three studies were not in the range of the LC_{50} value in the Russian study and did not meet the primary toxicity listing criteria of ≤ 0.5 mg/L. Of these three studies, results of one study with mortality were not considered appropriate to use because the phosmet formulation contained methylene chloride, a toxic component. Another study conducted in 1994, exposed rats to aerosols from an emulsion containing 27.5% phosmet and 8.4% naphthalenes. The aerosols were respirable-sized having a mass median aerodynamic diameter (MMAD) of 1.5–2.2 microns (μm). This study resulted in a LC_{50} of 1.19 mg/L for male rats and 0.845 mg/L for females. A third study conducted in 1995 reported a LC_{50} of 1.6 mg/L for rats and exposed the animals to a 70% phosmet particulates having a MMAD of 1.61 to 2.38 microns (μm).

Given the uncertainties with the inhalation toxicity data from (Danilenko, 1969) and based on the Agency's review of all the acute inhalation toxicity data for phosmet, EPA believes that there are no inhalation data meeting the primary listing criteria for phosmet of sufficient reliability or quality to support the listing of phosmet as an EHS chemical. As a result, EPA has decided to remove this inhalation value from consideration for the purpose of listing phosmet as an EHS. EPA solicits comments on the validity of the available inhalation toxicity studies to support listing of phosmet as an EHS based on the listing criteria for inhalation toxicity. EPA invites submission of any valid acute inhalation toxicity studies not already made available to EPA. EPA's review of all currently available acute inhalation toxicity studies can be found in the February 2003 Technical Background Document: Proposed Rule to Delist

Phosmet from the EHS List available in the public docket.

2. Phosmet Acute Dermal Toxicity

EPA undertook review of existing acute dermal toxicity data for phosmet. EPA could find no dermal toxicity data that met the primary dermal listing criteria of $LD_{50} \leq 50$ mg/kg. The lowest test results for technical phosmet indicated that the dermal LD_{50} is greater than 3160 mg/kg.

3. Phosmet Acute Oral Toxicity

Gowan submitted several acute rat oral studies in 1996, for technical grade phosmet and phosmet powder and emulsion formulations. None of the rat LD_{50} values from these studies met the EHS listing criteria, even when the percentage of inert ingredients in the formulation was taken into account. The lowest reported rat oral LD_{50} for technical grade phosmet (96.1%) is 113 mg/kg, which does not exceed the primary oral listing criteria of 25 mg/kg. The lowest reported rat oral LD_{50} for a phosmet formulation of 70% dust is 147 mg/kg (73.5 mg/kg based on active ingredient). Even when adjusted for the percentage active ingredient, this dose still does not exceed the criteria of 25 mg/kg.

Subsequently, EPA retrieved LD_{50} values from six mouse oral studies on technical grade phosmet from toxicity databases and the literature. Gowan was able to supply five of the mouse studies, which had been conducted by Stauffer Chemical Company. EPA also reviewed oral acute toxicity data available from OPP. Review of the six acute mouse oral studies indicates that mice are more sensitive than rats to phosmet. One mouse study conducted by Stauffer Chemical Company in 1971 reported a phosmet technical LD_{50} of 23.3 mg/kg for mice for technical grade phosmet, percentage unspecified. Another study conducted by researchers at NCTR (Haley *et al.*, 1975) reported LD_{50} results of 23.1 and 24.9 mg/kg for males and female mice, respectively for 99.5% phosmet. Other acute oral studies of technical grade phosmet with mice had LD_{50} results varying from 36.9 to 51 mg/kg. For a phosmet powder formulation, the lowest reported oral LD_{50} was 79.4 mg/kg in mice for 50% phosmet wettable powder. These studies are discussed in more detail in the February 2003 Technical Background Document: Proposed Rule to Delist Phosmet from the EHS List, available in the public docket.

The oral mouse LD_{50} of 23.3 mg/kg for phosmet technical resulted from testing a material called Imidan-EDC. Phosmet is also known by the name "Imidan."

Gowan stated that EDC (ethylene dichloride or dichloroethane), was a solvent used in the initial synthesis step of a discontinued process and that the impurity profile is not known. Gowan was not sure whether this product was ever registered for commercial use by Stauffer, who was the previous pesticide registrant with EPA. Gowan never utilized the EDC process and currently uses a benzene process to manufacture technical phosmet, the product currently registered with EPA. According to Gowan, Stauffer also licensed the phosmet-benzene process as a registrant with EPA. The Stauffer researchers determined the mouse oral LD_{50} for Imidan-Benzene to be 43 mg/kg. The greater toxicity observed for technical phosmet synthesized via the EDC route presumably may have been due to impurities resulting from the starting material, incomplete synthesis, degradation or other syntheses method-specific factors. Gowan believes that the "Imidan-EDC" phosmet is an inappropriate test substance. Because of these uncertainties, EPA does not believe the Imidan-EDC results are representative for the phosmet manufactured and registered with EPA by either Stauffer Chemical (former pesticide registrant) or Gowan Company (current pesticide registrant). Therefore, EPA removed these values from consideration for EHS listing purposes.

4. Phosmet Oral Mouse Study (Haley *et al.*, 1975)

Only one other study (Haley *et al.*, 1975) reported results with an $LD_{50} \leq 25$ mg/kg. This study examined the acute oral toxicity of five organophosphate pesticides (including Imidan or phosmet) in a total of three experiments: a range finding experiment, a pilot experiment, and a main experiment designed to estimate an LD_1 value and extrapolate an $LD_{0.1}$ value. LD_{50} values for phosmet were reported from the pilot study as 25.2 and 23.1 mg/kg for males and females, respectively and from the main study as 23.1 and 24.9 mg/kg for males and females, respectively. The study was conducted by the National Center for Toxicological Research (FDA), Arkansas. After reviewing this information, Gowan made several arguments why the information in the Haley study was insufficient to support the listing of phosmet as an EHS.

Haley *et al.* (1975) conducted two dose response experiments, a pilot study (100 mice) and a main study (660 mice). A linear regression was developed from the pilot results. The LD_{50} and its confidence intervals, and the slope of the regression and its

confidence intervals are provided in the journal article. Using this regression, doses for LD₁, LD₂, LD₄, LD₈, LD₁₆, LD₃₂, and LD₆₄ were taken from the regression and used in the main study. The goal of the study was to estimate the LD₁ and extrapolate the LD_{0.1}. For the pilot study the actual doses and number of animals killed are not presented. The LD₁, LD₁₆, and LD₅₀ results only, by sex, were presented in a table in Haley *et al.* (1975) as predicted doses from the pilot study and calculated doses from the main study. The actual doses in the main study were chosen based on the results from the pilot study. The log of actual doses and percentage of animals killed are presented in a graph for each sex, except the value of the LD₂ for males which gave an aberrant response.

One of Gowan's key criticisms of Haley *et al.* (1975) was that no mortality data was presented from the pilot experiment and complete data from the main experiment is presented only in graphical form. Because the actual doses and animals killed at each dose are not cited, Gowan stated that the LD₅₀ results cannot be replicated or confirmed. EPA agrees with Gowan that the lack of tabulated mortality data is a serious flaw in this experiment. EPA attempted to recover the actual mortality data from the National Center for Toxicological Research, but the NCTR was not able to recover it. Gowan also raised other issues regarding Haley *et al.* (1975) which included the variations in main study mortality response, lack of information on the use of control data, and other questions or potential problems with the study methodology or design. The Agency addresses these issues in detail in the technical background document supporting this rulemaking.

5. Phosmet Oral Mouse Study (Gowan 2002)

Because of the uncertainties surrounding verification of results of the Haley study, EPA proposed conducting a new acute oral mouse LD₅₀ study using the Up-And-Down Method, as described in the Office of Prevention, Pesticides and Toxic Substances (OPPTS) new Harmonized Test Guideline 870.1100 for Acute Oral Toxicity. This guideline has been adopted by the Federal Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM), the Organization for Economic Coordination and Development (OECD) and EPA's Science Advisory Panel (SAP). EPA's participation in ICCVAM is part of the Agency's commitment to support testing that reduces the use of animals.

Before EPA initiated the new test, Gowan decided to conduct its own acute toxicity study in mice. Based on its review of the existing toxicity data and the recommended test method, EPA provided Gowan with the recommended test method and comments on Gowan's draft test protocol. EPA recommended that Gowan test at multiple dose levels using the Up and Down Procedure (UDP) for acute oral toxicity. (See Docket for test method and comments provided to Gowan.)

Gowan completed its study of mouse responses to acute oral exposure to phosmet in December 2002. Their study planned to dose 20 female mice at 40 mg/kg, initially, with subsequent doses tested, if warranted. Twenty female mice were administered 40 mg/kg by oral gavage. After 14 days observation, there were no mortalities. Because no mortality occurred at 40 mg/kg, Gowan saw no need to conduct further tests. Thus, Gowan conducted a single dose study rather than an LD₅₀ test. Gowan believes the test results confirm that the oral LD₅₀ of phosmet exceeds 25 mg/kg listing criterion and that there is no basis for continuing to list phosmet as an Extremely Hazardous Substance.

The study results have been carefully reviewed by a cross-agency ad hoc committee whose consensus was that the Gowan study seemed to confirm the oral mouse LD₅₀ results from most of the previous literature studies, which showed LD₅₀s greater than EHS listing criterion of 25 mg/kg. EPA believes that the new test results support the conclusion that the acute oral LD₅₀ of phosmet exceeds 25 mg/kg and that phosmet should be removed from the EHS list. The Gowan study appears to be sound and conducted properly according to Good Laboratory Practices, although it is only for a single dose. The large number of mice (20) tested at a much higher concentration than the EHS List criterion supports the probability that the acute oral mouse LD₅₀ is greater than 25 mg/kg. In addition, Gowan had done a thorough chemical analysis of the phosmet material that was administered to the animals.

Normally EPA would not accept a single dose study for drawing conclusions about the LD₅₀ for a chemical. However, the Agency believes this study can be used in its analysis because of existing data indicating the approximate range of probable LD₅₀ values and data showing that phosmet has a steep dose-response curve. Although the new test did not follow new acute oral toxicity testing guidelines, the test results are consistent with the variability of individual animal

dose response seen in existing oral mouse LD₅₀ studies.

Phosmet is an organophosphate pesticide, with known lethal and toxic human health effects. However, after careful consideration of all of the toxicity data, EPA proposes that phosmet should be delisted from the EHS list for the following reasons: (1) The mouse oral LD₅₀ data that meet the criteria from the Haley *et al.* (1975) study have a number of deficiencies that increase the uncertainty around the results, such as lack of tabulated mortality data for either the pilot or the main study, lack of information on treatment of the control data, and considerable variability in the results at the LD₀₁–LD₀₈ doses, (2) the Haley LD₅₀ results are right at the limit of the oral toxicity listing criteria of 25 mg/kg, and (3) other acute mouse oral studies (including Gowan's December 2002 study conducted using Good Laboratory Practices) indicate the mouse oral LD₅₀ exceeds the 25 mg/kg listing criteria. EPA solicits comment on the proposed delisting decision and its rationale, and invites the public to submit or identify relevant peer-reviewed studies or data, of which the Agency may not be aware. EPA invites submission of any valid oral toxicity studies for phosmet that meet the listing criteria which are not already been reviewed by EPA. EPA's review of all currently available acute oral toxicity studies can be found in the February 2003 Technical Background Document: Proposed Rule to Delist Phosmet from the EHS List available in the public docket.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735), the Agency must determine whether this regulatory action is "significant" and therefore subject to formal review by the Office of Management and Budget (OMB) and to the requirements of the Executive Order, which include assessing the costs and benefits anticipated as a result of the proposed regulatory action. The Order defines "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by

another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations 40 CFR Part 355 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2050-0092, (EPA ICR No. 1395.04). Copies of the ICR document(s) may be obtained from Susan Auby, by mail at U.S. Environmental Protection Agency, Collection Strategies Division (Mail Code 2822), 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001, by email at auby.susan@epa.gov, or by calling 202-566-1672. A copy may also be downloaded off the internet at <http://www.epa.gov/icr> Include the ICR and / or OMB number in any correspondence.

This action does not impose any new information collection burden. This proposed rule will relieve burden for facilities that have phosmet on-site. Therefore, we conclude that this proposed action does not impose any new information collection burden, rather, it would relieve the regulatory burden for those facilities that handled phosmet. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB

control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

Comments are requested on the changes included in this proposal. Send comments on the ICR to the Director, Collection Strategies Division; U.S. Environmental Protection Agency (2823); 1200 Pennsylvania Avenue, NW., Washington, DC 20460-0001; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., NW., Washington, DC 20503, marked "Attention: Desk Officer for EPA." Include the ICR number in any correspondence. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after November 12, 2003, a comment to OMB is best assured of having its full effect if OMB receives it by December 12, 2003. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business that has fewer than 1000 or 100 employees per firm depending upon the SIC code the firm primarily is classified; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I hereby certify that this proposal will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse

economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the proposed rule on small entities" (5 U.S.C. 603 and 604). Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on small entities subject to the rule. This proposed rule would remove requirements for reporting and emergency planning for small entities with phosmet on site. We have therefore concluded that today's proposed rule would relieve regulatory burden for small entities.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal Agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA must prepare a written analysis, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials to have meaningful

and timely input in the development of regulatory proposals, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not include a Federal mandate that may result in expenditures of \$100 million or more for State, local, or tribal governments, in the aggregate, or the private sector in any one year. This is because this proposed rule would provide regulatory burden relief and does not impose any additional costs to any State, local, or tribal governments. EPA also has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. In addition, as discussed above, the private sector is not expected to incur costs exceeding \$100 million. Therefore, today's proposed rule is not subject to the requirements of Sections 202 and 205 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This proposal does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This proposed rule does not impose any new requirements on states or other levels of government. Instead it relieves LEPCs of the responsibility of developing and maintaining emergency plans for facilities that handle and store phosmet. SERCs and LEPCs will no longer be notified of releases of phosmet under the requirements of EPCRA Section 304. Thus, the requirements of section 6 of the Executive Order do not apply to this proposal.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this

proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."

This proposed rule does not have tribal implications, as specified in Executive Order 13175. This proposed rule does not impose any new requirements on tribal officials. Instead it relieves them of the responsibility of developing emergency plans for facilities that handle and store phosmet. EPA does not believe that tribes have any significant number of facilities that handle, store or use phosmet. Phosmet formulations are handled and stored by farm chemical distributors and used mostly on fruit and nut crops. Today's rule does not significantly or uniquely affect the communities of Indian tribal governments, nor would it impose substantial direct compliance costs on them. Thus, Executive Order 13175 does not apply to this rule.

EPA specifically solicits additional comment on this proposed rule from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Risks and Safety Risks

The Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that EPA determines (1) is "economically significant" as defined under Executive Order 12866, and (2) the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This proposal is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this proposed rule present a disproportionate risk to children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This proposed rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This proposed rule reduces regulatory burden. It thus should not adversely affect energy supply, distribution or use.

I. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects in 40 CFR Part 355

Environmental Protection, Air pollution control, Chemicals, Chemical accident prevention, Chemical emergency preparedness, Community emergency response plan, Community right-to-know, Extremely hazardous substances, Hazardous substances, Reportable quantity, Reporting and recordkeeping requirements, Superfund, Threshold planning quantity.

Dated: November 4, 2003.

Marianne L. Horinko,
Acting Administrator.

For the reasons set out in the preamble, part 355 of title 40 of the Code of Federal Regulations is proposed to be amended as follows:

PART 355—EMERGENCY PLANNING AND NOTIFICATION

1. The authority citation for part 355 continues to read as follows:

Authority: 42 U.S.C. 11002, 11004, and 11048.

Appendices A and B—[Amended]

2. Appendices A and B are amended by removing the entry for CAS No. 732–11–6 for the chemical name Phosmet.

[FR Doc. 03–28308 Filed 11–10–03; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION**47 CFR Parts 22, 24, and 90**

[WT Docket Nos. 02–381, 01–14, 03–202; FCC 03–222]

Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services; 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services; and Increasing Flexibility To Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and To Facilitate Capital Formation

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission examines ways of amending spectrum regulations and policies in order to promote the rapid and efficient deployment of quality spectrum-based services in rural areas.

DATES: Submit comments on or before December 29, 2003. Submit reply comments on or before January 26, 2004.

FOR FURTHER INFORMATION CONTACT:

Nicole McGinnis, Wireless Telecommunications Bureau, at (202) 418–0317, or via the Internet at Nicole.Mcginnis@fcc.gov. For additional information concerning the information collections contained in this document, contact Judith-B. Herman at (202) 418–0214, or via the Internet at Judith.B-Herman@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's *Notice of Proposed Rulemaking (NPRM)*, FCC 03–222, adopted September 10, 2003, and released October 6, 2003. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the FCC's copy contractor, Qualex

International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: www.fcc.gov. Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at Brian.Millin@fcc.gov.

Synopsis of the NPRM**I. Introduction and Overview**

1. In this Notice of Proposed Rulemaking (*NPRM*), we continue to examine ways to promote the rapid and efficient deployment of quality spectrum-based services in rural areas. We build upon the record developed in response to our *Notice of Inquiry*, in which we sought comment on how we could modify our policies to further encourage the provision of wireless services in rural areas. See *Facilitating the Provision of Spectrum-Based Service to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02–381, *Notice of Inquiry*, 68 FR 723 (January 7, 2003) (*Rural NOI*). We also draw upon the findings and recommendations of the Spectrum Policy Task Force.

2. The Commission's primary mission is the promotion of "communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." Furthermore, for auctionable services, the Commission is required to promote various objectives in designing a system of competitive bidding, including the development and rapid deployment of new technologies, products, and services for the benefit of the public, "including those residing in rural areas," and "the efficient and intensive use of spectrum." Under section 706 of the Communications Act, the Commission is also directed to "encourage the provision of new technologies and services to the public." Consistent with these statutory mandates, the Commission's spectrum policy goals generally have been to facilitate efficient use, competition, and rapid, widespread service consistent with the goals of the Communications Act.

3. On a national scale, the deployment of wireless mobile services has been a huge success, resulting in increased competition and services overall. We believe that a number of measures that the Commission has already adopted have contributed to this successful

deployment of wireless service. Recently, the Commission took steps to facilitate spectrum leasing in secondary markets, building upon existing, flexible, market-based policy efforts to encourage more efficient use of spectrum. The Commission did so with the belief that secondary markets would also facilitate investment in rural areas.

4. We recognize the inherent economic challenges of providing telecommunications services in sparsely populated, expansive rural areas. We note that the Federal-State Joint Board has solicited comment on issues relating to the eligibility of wireless carriers to receive universal service support. Further, the Wireless Telecommunications Bureau and the U.S. Department of Agriculture's Rural Utilities Service (RUS) have recently initiated a "Federal Rural Wireless Outreach Initiative" that seeks to harmonize the agencies' policies regarding rural wireless deployment and highlight the RUS loan programs available to wireless companies that serve rural communities. At present, programs are available to support the provision of spectrum-based services in rural areas.

5. We believe that rural as well as urban consumers and businesses have benefited from our market-oriented policies that promote facilities-based competition for telecommunications services. The Commission recently found that there is effective competition in the CMRS marketplace as a whole, including in rural areas. The Commission's policy to let market forces determine the number of firms operating in a given geographic area, subject to limits on spectrum availability and aggregation, recognizes this fact, and allows firms to operate at a competitive and efficient scale of operation. The Commission recognizes that, as a result of varying technical and demographic characteristics, the economics of providing service can be significantly different in rural areas as compared to urban areas. Our proposals attempt to acknowledge that market characteristics, especially demographics, will affect the optimal market structure.

6. Furthermore, there may well be a public interest in policies that encourage potential users to become mobile subscribers due to the network externalities that would result. In short, network externalities occur when adding a user to a communications network increases the value of the network for existing users who wish to communicate with that new user. For this reason, it is an especially important Commission goal to facilitate access to service broadly, not just in urban

markets but also in rural areas, to enable Americans who travel, reside or conduct business throughout the country to communicate effectively for the benefit of the general public interest.

7. The *NPRM* focuses upon the following issues: (1) Determining an appropriate definition of what constitutes a "rural" area for purposes of our policies and requirements; (2) creating mechanisms for access to "unused" spectrum; (3) relaxing performance requirements to remove disincentives to serve rural areas and to allow all geographic area licensees to satisfy construction requirements by providing "substantial service" in their initial license term; (4) determining whether geographic area licensees should be required to provide coverage to increased portions of their licensed areas after their initial license term; (5) amending our regulations to permit increased power limits in rural areas for both licensed services and unlicensed services; (6) evaluating the appropriate size of licensing areas for geographic area licenses; (7) determining what, if any, regulatory or policy changes should be made to complement the RUS program for low interest loans for deployment of broadband services; (8) considering whether we could enhance access to capital by permitting the grant of conditional security interests in spectrum licenses to RUS; (9) considering whether we should modify application of the cellular cross-interest rule in Rural Service Areas (RSAs) with greater than three competitors; (10) establishing a clear, predictable policy on infrastructure sharing; and (11) updating and refining our rules governing the Rural Radiotelephone Service (RRS) and Basic Exchange Telephone Radio Systems (BETRS).

II. Notice of Proposed Rulemaking on Increasing Flexibility and the Deployment of Spectrum-Based Services in Rural Areas

A. Definition of "Rural"

8. As an initial matter, we seek comment on an appropriate definition of a "rural area" for use in conjunction with each of the policies addressed in this proceeding. Furthermore, given the various definitions of "rural" that already have been utilized, we believe that some clarification of the term is necessary. Although sections 309(j)(3) and 309(j)(4) of the Communications Act direct the Commission to promote the development and deployment of spectrum-based services to "rural areas," the Communications Act does not define "rural areas," nor has the Commission adopted a specific

definition of "rural areas" for purposes of implementing section 309(j). In the *Seventh and Eighth Competition Reports*, 17 FCC Rcd 12985 (2002) and 18 FCC Rcd 14783 (2003), the Commission used three different proxy definitions of "rural" for purposes of analyzing the average number of mobile telephony competitors in rural versus non-rural counties. The Commission compared the number of competitors in: (1) RSA counties versus MSA counties; (2) non-nodal Economic Area (EA) counties versus nodal EA counties; and (3) counties with population densities below 100 persons per square mile versus those with population densities above 100 persons per square mile. In connection with administering universal service support programs for schools, libraries, and rural health care providers, the Commission defines "rural area" as any county outside of an MSA (with some exceptions). Moreover, the federal government has multiple ways of defining "rural," reflecting the multiple purposes for which the definitions are used. The Commission has used RSAs as a proxy for "rural" in certain instances. In administering its financial assistance program for broadband access to rural areas, RUS defines "rural" as any place that is not located within an MSA and that has no more than 20,000 inhabitants (based upon the most recently available Census data). The Economic Research Service of the USDA, in conjunction with others, developed a definition of "rural" based on a set of metrics that delineates each census tract as being either rural or urban. By contrast, the Census Bureau established a different metric for defining "rural" areas during its 2000 census. Although there are many definitions of "rural" used by the federal government, we have developed a record in response to our *Rural NOI* proceeding that provides some guidance with respect to an appropriate definition of "rural area."

9. Based upon the record developed in the *Rural NOI* proceeding, as well as certain definitions used by the Commission and by other federal agencies as proxies for "rural," we have identified and seek comment on the following potential definitions of "rural area," or some combination of elements combined in these potential definitions: (1) Counties with a population density of 100 persons or fewer per square mile; (2) RSAs; (3) non-nodal counties within an EA; (4) the definition for "rural" used by the RUS for its broadband program; (5) the definition for "rural area" used by the Commission in connection with universal service

support for schools, libraries, and rural health care providers; (6) the definition of "rural" based on census tracts as outlined by the Economic Research Service of the USDA; (7) the Census Bureau definition of "rural" counties; and (8) any census tract that is not within ten miles of any incorporated or census-designated place containing more than 2,500 people, and is not within a county or county equivalent which has an overall population density of more than 500 persons per square mile of land. In the event that commenters disagree with these potential definitions, we ask commenters to provide alternative definitions of "rural." Commenters that believe that none of these potential definitions are workable or feasible should identify specific factors that the Commission should consider when determining whether an area is a "rural area," such as population density, Census rankings, or other criteria. Finally, we seek comment on whether we should adopt different definitions of what constitutes a "rural area" depending upon the policy initiative for which the definition is used, as set out in this proceeding.

B. Improved Access to Unused Spectrum

1. Background

10. The Commission has promoted access to and efficient use of spectrum through a variety of means that may foster the rapid and efficient deployment of wireless services in rural areas. Applied to licensed spectrum, these approaches may be viewed as existing along a continuum, with voluntary, market-based mechanisms at one end, regulatory incentives and other approaches in the middle, and regulatory mandates and enforcement mechanisms at the other end. More specifically, the means by which the Commission may promote access to and use of spectrum range from allowing voluntary arrangements that move spectrum and licenses between users to establishing regulatory mechanisms by which the Commission reclaims and re-licenses unused spectrum.

11. In many spectrum-based services, the Commission has established rules by which it reclaims unused spectrum and makes it available to other parties. This process for reclaiming unused licensed spectrum differs across services. For example, with site-based private land mobile radio services, licensees generally are given one year to construct particular sites. A licensee with an unconstructed site after one year loses its authorization to operate at that site,

and other parties subsequently may request a license to operate in that unused spectrum. In the geographically-based cellular service, initial licensees are given five years to construct facilities and begin providing service within a geographic service area. At the end of the initial five-year period, the licensee is allowed to keep those portions of its licensed area in which it has constructed, while the unconstructed portions of the market become available for licensing to other parties via the cellular "unserved area" licensing process. We refer to this standard as a "keep what you use" approach.

12. Other geographically licensed services, in contrast, face notably different construction benchmarks and means by which unused spectrum may be reclaimed and re-licensed by the Commission. For example, PCS licensees must meet five- and ten-year benchmarks that mandate coverage of a certain percentage of the population of their licensed areas, or where applicable, make a showing of substantial service. Failure to meet these benchmarks results in automatic cancellation or non-renewal of the entire license, including the rights to operate from any facilities already constructed under the authorization. Moreover, for many services, if the licensee loses its authorization for failing to meet the coverage requirements, it is often ineligible to reapply for that authorization. However, once these benchmarks are achieved, licensees are generally afforded exclusive rights and a renewal expectancy for the entire area and band under the license regardless of whether service is being provided in all parts of the area or over all of the spectrum. Because licensees that fail to comply with this coverage requirement lose their entire license, we refer to this standard of termination or forfeiture as the "complete forfeiture" approach. Among the advantages of this model, since licensees do not have to cover their entire geographic license areas or use all of their licensed spectrum capacity, there is a greater incentive for licensees to build out those areas that will ensure their economic viability as providers. Among the disadvantages is the potentially lower likelihood that rural and less-populous areas will be served by the licensee, because there may be an incentive for construction to focus first on populous areas and little corresponding incentive for licensees to construct in rural areas.

13. In addition, there are other approaches the Commission may use to transition spectrum to higher-valued

uses. For example, as the Spectrum Policy Task Force observed, the Commission could create expanded "overlay" rights to licensed spectrum, whereby usage rights are given to new licensees. To address issues related to the incumbent licensees in these bands, the Commission could adopt various policies, including mandatory relocation of incumbents to other bands, grandfathering incumbents in the existing band, or providing incentives for band-clearing. Overlays with relocation of incumbents were used in broadband PCS, while grandfathering of incumbents was used in services such as paging and SMR. Among the advantages of this approach, overlays may be more flexible and, in some cases, less burdensome on incumbents. Among the disadvantages of this approach are potential incumbent hold-out problems, lengthy periods for incumbent relocation, and the expense of additional auctions. Because the "keep what you use," "complete forfeiture," and other approaches such as overlays may not be effective tools to ensure prompt delivery of service to rural and underserved areas, we explore below alternative methods to facilitate access to and use of spectrum in these markets.

2. Discussion

a. What Constitutes "Use" of Spectrum

14. As the Commission attempts to increase efficient access to and use of spectrum, and as it subsequently establishes policies for access to unused spectrum, we must provide a clear definition of "use" for all parties affected by these rules. That is, licensees that construct or lease their spectrum must understand how this use is construed in terms of construction requirements, re-licensing, and other policies that may affect them so that they will know what rights licensees will retain in the event they do not "use" their spectrum, however we define it. We seek comment on how to define "use" in order to effectively promote access to and use of spectrum in rural areas. We also inquire how to define this term in a flexible manner so as to recognize the many ways in which licensees provide service, or allow other parties to provide service, with their licensed spectrum. Under our current rules for many service bands, "use" is defined to reflect construction and operation of specified facilities by the licensee. We seek comment on whether this is the appropriate baseline standard for determining use and, if not, what this standard or other "performance" criteria should be.

15. We recognize that leasing via secondary markets may require viewing the concept of use from a different perspective. That is, under a negotiated spectrum leasing arrangement, a licensee assigns a usage right to a third party. We propose that spectrum in rural areas that is leased by a licensee, and for which the lessee meets the performance requirements that are applicable to the licensee, should be construed as "used" for the purposes of this proceeding and any other performance criteria we adopt. We note that merely leasing spectrum, where the lessee does not fully meet the lessors' performance requirements, would not be considered "use" under this proposal. We seek comment on this approach and other ways we could better tailor or expand the concept of "use" to encourage service by licensees or lessees in rural and underserved areas. Finally, should our definition of "use" be in any way limited as it applies to leasing?

16. Under one approach to defining construction, the Commission would rely on the filings of wireless providers, perhaps with certain reporting criteria. This approach is based on the presumption that wireless providers are in the best position to determine the meaning of "built" for their particular technology and application. Moreover, such an approach is consistent with recent Commission precedent and trends. With broadband PCS licensees, for example, the Commission did not attempt to specify a particular signal level, but instead required licensees to provide a signal level "sufficient to provide adequate service" to one-third of the population in the market within five years, and to two-thirds within ten years. In applying this approach to measuring construction, the Commission could provide guidance regarding what type of range would be acceptable and how this might vary from service to service. Alternatively, we could decline to provide direction and simply monitor the various means by which licensees report their construction.

17. We recognize that the approach described above, however, may present certain risks, particularly in the event that a licensee claims that it is satisfying the more flexible "substantial service" standard, instead of satisfying a concrete coverage benchmark. The Commission may not have sufficient resources to verify that the many different uses of rural spectrum likely to emerge will actually serve the goals of our build out requirements. Additionally, we note that this approach might present some risk for the licensee. For example, were

it able to do so, the Commission could determine, upon receiving an assertion of compliance by a licensee, that the indicated build out is insufficient and that the licensee must do more in order to satisfy its construction requirements. This would require additional construction and investments not planned for by the licensee, which ultimately could prove more expensive to comply with than if they had been planned for and completed with the original build out. We therefore seek comment regarding whether the Commission should establish a baseline above which a licensee must reach in order to minimally comply with our substantial service requirements. We seek comment on whether this baseline should be determined in terms of signal strength or using some other metric.

18. We also seek comment on two other approaches for determining whether spectrum is being used in accordance with construction requirements or for purposes of finding available spectrum in rural areas. First, the Commission has developed rules defining protected service areas for site-based incumbents, such as 220 MHz, 800 MHz SMR, and paging licensees. We seek comment on how we should address these and other differences in estimating coverage in rural areas. In light of the fact that our rules defining protected service areas vary by service, we ask commenters whether we should harmonize these regulations across services and establish a data base of available "white space" in rural areas. Second, we seek comment on expanding the use of spectrum "audits" and on exploring the means and methodologies for making in situ measurements of signal strength in selected rural areas to maintain an "inventory" of available spectrum resources. We inquire as to whether expanded use of such audits would help identify unused spectrum in rural areas so as to ultimately make more spectrum, and thus more service, available in these markets. We also inquire as to what may be an appropriate way to test whether a spectrum inventory is feasible. Should we limit such an inventory to the most rural or underserved areas? We believe markets in Alaska, Appalachia, and the Mississippi Delta may be particularly appropriate, and we inquire as to whether commenters recommend these or other areas.

b. Re-licensing vs. Market-Based Mechanisms

19. As described above, the Commission practices re-licensing in several different forms, both in terms of the conditions under which licensed

spectrum is returned to the Commission, and in terms of how that spectrum subsequently is made available to other users. Generally, licensed spectrum may return to the Commission due to non-use under a "complete forfeiture" standard, as applied to PCS licensees, or under a "keep what you use" standard, as applied to cellular licensees. Once this spectrum is reclaimed, the Commission may then re-license via competitive bidding, as with PCS licenses, or it may use a non-auction mechanism such as the cellular unserved area re-licensing rule.

20. We seek comment on when, and under what circumstances, the Commission should use re-licensing as a means to increase access to spectrum, and thus service, especially in rural areas. We do not propose to change the current re-licensing rules for any current wireless service. Rather, we inquire as to whether we should apply one of the current rules, or some other rule, to future spectrum allocations. We also inquire as to whether we should apply a new standard to spectrum that has been returned, under the current rules, to the Commission for re-licensing at the end of a licensee's second term.

21. In the event of spectrum re-licensing, we seek comment on whether there are particular construction standards, such as "complete forfeiture" or "keep what you use," that are most effective in promoting access and service, especially in rural areas. In particular, we seek comment on whether a "keep what you use" standard based on the cellular unserved area model is most appropriate to advance our goal of promoting rural service, should we decide to extend this approach to additional services. Further, how might the "keep what you use" approach work in tandem with the substantial service safe harbor that we propose below?

22. As described above, in the cellular service, after the initial five-year period, there is an unserved area licensing process whereby unconstructed portions of a market become available to other parties. In a Petition for Reconsideration filed in WT Docket 01-108, Dobson proposed that licensees should be permitted to extend into unserved areas of less than 50 square miles operating on a secondary non-interference basis to any licensee that might be authorized to cover the area in the future. While we intend to address Dobson's petition in the context of that proceeding, we seek comment on whether there are other changes to the cellular unserved area rules that could promote service in rural areas. We also seek comment on

whether, for purposes of defining use, the most appropriate approach would be based on the PCS model (*i.e.*, allowing providers to define construction based on their particular technology and application). We note that the approach with the PCS model is technology neutral, yet it requires a sufficiently strong signal to produce a reasonable level of service.

23. In addition, we seek comment on the relative merits of re-licensing as compared to secondary markets. Are there particular circumstances or factors that we should consider in deciding to use one approach or the other? We recognize that re-licensing is a more regulatory approach, and we therefore inquire as to whether we should limit its application. What market conditions or other measures should we consider in determining whether to apply re-licensing to a particular service or in a particular market? Is this approach more appropriate for rural markets, and if so, why?

24. Finally, we note that while the Spectrum Policy Task Force recommended that the Commission focus on secondary markets as the primary means to increase access to spectrum, it also recommended that, after there has been sufficient time to consider the effectiveness of this approach, the Commission also consider alternative mechanisms such as government-defined easements. We seek comment on whether now is an appropriate time to consider the use of spectrum easements for new licenses.

C. Performance Requirements

25. Subsequent to the enactment of section 309(j), the Commission initiated the *Competitive Bidding* proceeding, which, among other things, addressed how the Commission intended to implement the statutory mandate for "performance requirements" for licenses awarded through competitive bidding. *See Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, PP Docket No. 93-253, *Notice of Proposed Rulemaking*, 58 FR 53489 (October 15, 1993). Depending upon the service, the Commission's construction benchmarks may require coverage of a certain percentage of the licensed area's population or coverage of a certain percentage of the licensed area's geographic area. For many services, the Commission has adopted a flexible "substantial service" construction standard that allows licensees that are providing a beneficial use of the spectrum to retain their authorizations. While the definition of "substantial service" is generally consistent among wireless services, the

factors that the Commission will consider when determining if a licensee has met the standard vary among services. Substantial service generally means service that is sound, favorable, and substantially above a level of mediocre service that would barely warrant renewal.

1. Substantial Service Construction Benchmarks

a. Background

26. As we have explained, the Commission has taken a market-oriented approach to spectrum policy that, where possible, has allowed economic forces to determine build-out of wireless facilities and the provision of wireless services. The Commission has shifted towards providing licensees increased flexibility to tailor use of their spectrum to unique business plans and needs. This increased flexibility is evident in our adoption of the "substantial service" benchmark for many of our services. In more recently adopted rules for wireless services, the Commission established the substantial service standard as the only construction requirement. In addition, for licensees subject only to the substantial service requirement, the Commission often has included "safe harbors," *i.e.*, examples of how a licensee would meet the substantial service standard.

b. Discussion

27. As a general matter, we believe that our current performance requirements, in combination with economic incentives and the licensing of multiple competitors, have served to promote significant build out. Nevertheless, we believe that current geographic area licensees without a "substantial service" option or a rural-specific construction requirement may be unduly constrained and may lack sufficiently flexibility to provide service to rural areas or to offer niche services. Moreover, given the unique characteristics and considerations inherent in constructing within rural areas, we believe that a construction standard that is based upon coverage of a requisite percentage of an area's population may be an inappropriate measure of levels of rural construction. Accordingly, while we intend to keep our current construction requirements, as they are set forth in our service-specific rule sections, we propose to adopt a "substantial service" alternative for all wireless services that are licensed on a geographic area basis and that are subject to construction requirements. This proposal therefore would affect the

following licensees: 30 MHz broadband PCS licensees; 800 MHz SMR licensees (blocks A, B, and C only); certain 220 MHz licensees; LMS licensees; MDS/ITFS licensees; and 700 MHz public safety licensees. If we adopt our proposed modification of our build-out rules, these licensees would have the flexibility to comply with existing service-specific benchmarks or to satisfy the substantial service benchmark, at their option.

28. We are concerned that current population-or geographic area-specific benchmarks may impinge upon licensees' abilities to serve niche or less populated areas, and may unintentionally discourage construction in rural areas. Particularly in the case of a population-based construction requirement, a licensee has both an economic and practical incentive to achieve compliance with the requirement by providing service only to the urban areas of its licensed area. In addition, because each licensee must satisfy the same population-based benchmark, we are concerned that, as multiple licensees enter a market, they likely will construct systems in the same populous areas, thereby duplicating coverage. Consequently, within any given market, urban areas are likely to have multiple wireless competitors providing service, whereas rural areas may have fewer options.

29. We believe that providing all geographic area wireless licensees with a substantial service option will address concerns that construction requirements based on population or geographic coverage may discourage the build-out of rural areas. As we have explained in past proceedings, the substantial service option provides licensees with greater flexibility and therefore may result in the more efficient use of spectrum and the provision of service to rural, remote, and insular areas. Furthermore, in light of the fact that we have been moving towards a more flexible approach to coverage requirements, offering all geographic area wireless licensees a substantial service option will increase regulatory parity. We also note that, by providing terrestrial wireless licensees with greater flexibility in satisfying their construction requirements and by alleviating the pressure of satisfying minimum population-based benchmarks, licenses that are comprised largely of rural areas might be more likely to appeal to a wider range of potential bidders at auction.

30. We intend to retain our current construction benchmarks and propose adopting the substantial service benchmark as an additional means of satisfying our construction

requirements. Our proposal effectively would harmonize construction benchmarks across all wireless services licensed on a geographic-basis (and that are subject to construction requirements) so that all geographic area licensees have the increased flexibility of a substantial service option. Licensees may elect to satisfy either the construction benchmark options already available to them today or the substantial service benchmark, according to their preference. In the past, in evaluating substantial service showings, we have considered factors such as whether the licensee is offering a specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers, and whether the licensee's operations serve niche markets. In the context of providing substantial service to rural areas, we are particularly interested in the following factors: (1) Coverage of counties or geographic areas where population density is less than or equal to 100 persons per square mile; (2) significant geographic coverage; (3) coverage of unique or isolated communities or business parks; and (4) expanding the provision of E911 services into areas that have limited or no access to such services. We intend to limit this proposal to wireless services that are currently licensed on a geographic area basis. In the event we adopt geographic areas for new wireless services at a future date, we will examine the appropriateness of adopting a substantial service or alternative construction requirement for the new service at that time.

31. We seek comment on our proposal to adopt a "substantial service" benchmark for all wireless services that are licensed by geographic area and are subject to build-out requirements, but currently do not have a substantial service option. We also seek comment on whether any services should be excluded from our proposal. In the event that commenters believe that a substantial service standard is inappropriate for certain services, we ask commenters to suggest alternative benchmarks that might promote the deployment of service within rural areas. We ask commenters whether the adoption of a substantial service requirement is likely to increase deployment of wireless services in rural areas. Finally, because this proposed modification of our rules will apply generally to all geographic area licensees, and not just those licensees serving rural areas, we ask how the adoption of a substantial service

requirement might affect the deployment of wireless services in non-rural areas.

32. We also seek comment on whether we should adopt geographic-based construction requirements for those private and commercial terrestrial wireless services that are licensed on a geographic area basis and that currently do not have a geographic area coverage option. A geographic benchmark would provide an alternative for licensees who do not intend to focus construction efforts on population centers. Further, like population-based benchmarks, geographic benchmarks would provide increased certainty for licensees, in comparison to the more flexible substantial service standard. Commenters supporting geographic-based construction requirements should identify the applicable radio service(s) and recommend benchmark levels, or percentages, for the relevant market sizes. We seek comment on whether the benchmark levels may be reduced where the geographic areas in question are rural areas.

33. In addition to proposing the adoption of a substantial service benchmark for all wireless services that are licensed by geographic area, we propose the adoption of a substantial service "safe harbor" based on provision of rural service. We propose two different rural safe harbors, depending on whether a licensee is providing mobile or fixed wireless service. With respect to mobile wireless services, we propose that a licensee will be deemed to have met the substantial service requirement if it provides coverage, through construction or lease, to at least 75 percent of the geographic area of at least 20 percent of the "rural" counties within its licensed area. We propose that "rural" counties be defined as those counties with a population density less than or equal to 100 persons per square mile. For example, if a licensee's market contains five counties (all having a population density of 100 persons per square mile or fewer), the licensee could meet the safe harbor by providing coverage to 75 percent of the geography in one of those five counties. With respect to fixed wireless services, we propose to define the substantial service requirement as met if a licensee, through construction or lease, constructs at least one end of a permanent link in at least 20 percent of the "rural" counties within its licensed area (using the same "rural" county definition). For example, if a licensee's market contains five counties (all having a population density of 100 persons per square mile or fewer), the licensee could meet the safe harbor by constructing one

end of a permanent link in one of those five counties. Our proposal to base the safe harbor on a population density of 100 persons per square mile or fewer is derived from our finding in the *Eighth Competition Report*, which indicates that counties with population densities of 100 persons per square mile or less "have an average of 3.3 mobile competitors, while the more densely populated counties have an average of 5.6 competitors." We note that these proposed "safe harbors" are intended to provide licensees with a measure of certainty in determining whether they are providing substantial service, but are not intended to be the only means of demonstrating substantial service.

34. We seek comment on whether we should adopt rural safe harbors and, if so, whether it is advisable to adopt the specific safe harbors described above. We note that although the analyses of competition in counties with population densities of 100 persons per square mile or fewer were based upon data pertaining to the mobile telephony industry (dominated by cellular, broadband PCS, and digital SMR providers), we believe that 100 persons per square mile nevertheless provides a usable and reasonable proxy for "rural" for the purpose of establishing a rural substantial service safe harbor. We seek comment on this proposed population-density based standard. In particular, we seek comment on whether this safe harbor is suitably flexible to accommodate variances in service areas and how we might modify our safe harbors to accommodate various geographic service areas and uneven population distributions. In the event commenters disagree with our proposed safe harbors, we ask that commenters suggest examples of alternative rural safe harbors, in light of their practical experience and based upon their own service-specific demands and requirements. Should we adopt a rural safe harbor that applies to all services, or are services sufficiently specialized that we should adopt service-specific safe harbors?

2. Renewal License Terms

a. Background

35. At present, we require compliance with our construction requirements during the initial license term. Depending upon the particular service, we require licensees to satisfy minimum coverage benchmarks at an interim period prior to the end of the initial license term, and/or at the conclusion of the initial license term. Licensees obtain authorizations to use designated spectrum for a specific period of time

(typically a term of ten years), and may request renewal of their authorizations prior to the expiration of their license terms. Once a licensee renews its license, however, no additional performance requirements are imposed in subsequent license terms.

b. Discussion

36. We seek comment on whether we should require geographic area licensees to satisfy performance requirements during their renewal license terms (we refer to license terms subsequent to the initial license term as "renewal terms"). This question of whether licensees should satisfy additional performance requirements during renewal terms is particularly relevant as licensees approach the end of their initial license terms or enter into their renewal terms. We ask whether additional performance requirements are likely to increase the provision of wireless services to rural areas.

37. With respect to commercial mobile wireless services, we have seen the prompt use of at least a portion of the spectrum and provision of at least a minimum level of service. While this data appears to suggest that our construction requirements have facilitated competition and have promoted the deployment of wireless services, it is nevertheless difficult to identify whether wireless deployment is the result of our minimum coverage requirements or the operation of market forces. We ask commenters whether market forces, and not build out requirements, should govern any additional construction during renewal terms. Will the imposition of additional performance requirements during renewal terms likely result in uneconomic construction?

38. In the event that commenters believe additional construction requirements are appropriate and necessary to promote the continued deployment of wireless services to consumers in rural areas, we ask what form these construction requirements should take. For example, should we adopt a population- or geography-based benchmark? Should we adopt a modified version of substantial service and require the provision of additional coverage beyond what is sufficient to satisfy "substantial service" during the initial license term (in effect, a "substantial service plus" requirement)? Should we require compliance with these benchmarks at the expiration of the renewal term, or at some interim period prior to the end of the renewal term? Furthermore, given our objective of promoting service to rural consumers, we ask whether renewal term

construction requirements should be specifically targeted towards construction in rural areas or otherwise include a rural component.

D. Relaxed Power Limits

1. Background

39. In the following sections, we propose modifications to our regulations governing power limits and technical specifications for operations in rural areas. In its report, the Spectrum Policy Task Force recommended that in less congested areas (*i.e.*, rural areas) spectrum users should be permitted to operate at higher power levels so long as they do not cause interference and do not receive additional interference protection. Similarly, in the *Rural NOI* we observed that technical and operational rules throughout the spectrum-based services are necessary to facilitate efficient use of the radio spectrum while minimizing the potential for interference among licensees. We sought comment on the degree of flexibility that these regulations afford to providers of spectrum-based services in rural areas.

2. Discussion

a. Part 15 Unlicensed Devices and Systems

40. Unlicensed devices are permitted to operate under Part 15 of our rules at very low power levels. One of the more significant developments in the use of unlicensed devices is the emergence of wireless Internet service providers or "WISPs." Using unlicensed devices, WISPs around the country are beginning to provide an alternative high-speed connection to cable or DSL services. In addition to providing competition to cable and DSL, the record reflects that WISPs have taken root in many rural areas where these services have been slow to arrive.

41. We remain committed to exploring more flexible spectrum policies for rural areas to help foster, where possible, a viable last mile solution for delivering Internet services, other data applications, or even video and voice services to underserved or isolated communities. The record in the *Rural NOI* identifies legitimate issues under our Part 15 policies, such as interference with other Part 15 devices and how to design a framework that reasonably ensures that Part 15 devices operate using different parameters in different locations or under differing RF conditions. Cognitive radio technologies, which permit radio systems to modify their performance in response to such external information, would appear to hold great promise in

resolving such issues. In this connection, we plan to initiate a proceeding shortly to consider how to leverage these technologies to permit more intensive use of spectrum in a number of situations, including possible rule changes that would permit greater use of spectrum in rural areas. In this proceeding, we plan to invite comment on any specific factors that may need to be considered to allow cognitive radios to operate with higher power in rural America. This impending proceeding also will address power limits for the operation of "dumb" or "non-cognitive radio" unlicensed devices in rural areas.

b. Licensed Services

42. Two commenters responding to the *Rural NOI* address the issue of whether we should modify our regulations to permit increased power levels in the context of mobile voice systems. South Dakota Telecommunications Association (SDTA) points out that higher power levels could reduce the number of transmitters required to connect stretches of roadways between small rural towns and to serve ranches and farms beyond the highways, but cautions that while it may be feasible to increase power and still safeguard urban and suburban operations, such safeguards must include "clear-cut interference definitions and protections." CTIA, however, argues that an increase in base station power levels would not improve matters unless mobile station (*i.e.*, handset) power levels are increased as well. CTIA contends that it is unlikely that handset manufacturers would make special "high power" handsets for rural areas.

43. Increasing the range of radio systems is one means of making it more economical to provide spectrum-based radio services in rural areas by potentially lowering infrastructure costs. One way to increase the range of radio systems is by increasing power levels. While there may be challenges in implementing increased power levels for cellular-like mobile systems, we would like to further investigate whether power increases may be beneficial for other mobile or fixed services. In doing so, we must consider increasing power levels in rural areas in the context of base/mobile systems, point-to-point systems, and point-to-multipoint systems. Base/mobile systems (*e.g.*, cellular, PCS, SMR, private land mobile) consist of a base station antenna intended to provide coverage over a specific area, and the mobile units that communicate with the base station. The base station operates at a sufficient power level to cover the

desired area, while the battery-powered mobile units operate at relatively low power. The ability of the base station to reach a mobile unit is limited by, among other things, transmitter power, the propagation characteristics of the frequency band, antenna directionality (gain), antenna height, terrain, clutter, man-made obstructions, and the sensitivity of the mobile unit receiver. As stated above, there are challenges related to increasing power levels. First, increasing the base station power may cause unacceptable levels of interference to nearby systems. Second, simply guaranteeing that a mobile unit can "hear" the base station, however, is not sufficient for two-way communications. The low power mobile unit, which is likely located close to ground level, must also be able to return a signal to the base station antenna, *i.e.*, the base station must be able to "hear" the mobile unit. One can observe that, at the fringe of the base station coverage area, the most significant limiting factors to two-way transmissions are the power level and the location of the mobile unit. Thus, merely increasing the base station power level may not improve the communications range unless the mobile unit is capable of returning a signal to the base station antenna.

44. It is instructive to provide examples of the likely results of increasing base station power for specific types of base/mobile systems. Because received signal levels decrease exponentially as the receiver moves farther from the transmitter, we would expect that relatively large increases in power would yield only small increases in communications range. In the case of a rural 800 MHz cellular system, we found that increasing the base station power by 10 percent (500 W ERP to 550 W ERP) and 20 percent (500 W ERP to 600 W ERP) increased the base station range by 1.5 km (0.93 mi) and 3 km (1.86 mi) respectively. We note, however, that our calculations show that a typical 0.5 W ERP mobile unit would not have sufficient range to reach the base station from the edge of the base station coverage area regardless of whether the base station power is 500 (maximum under the rules today), 550, or 600 W ERP. Similarly, in the case of a rural 1,900 MHz PCS system, we found that increasing the base station power by 10 percent (1,640 W EIRP to 1,804 W EIRP) and 20 percent (1,640 W EIRP to 1,968 W EIRP) increased the base station range by 1 km (0.62 mi) and 2 km (1.24 mi) respectively. We note, however, that our calculations show that a typical 0.8 W EIRP mobile unit

would not have sufficient range to reach the base station from the edge of the base station coverage area regardless of whether the base station power is 1,640 (maximum under the rules today), 1,806, or 1,968 W EIRP.

45. Microwave point-to-point systems generally consist of a highly directional, high gain transmitting antenna and a highly directional, high gain receive antenna separated by some distance along a path. System performance is impacted by, among other things, transmitter power, propagation characteristics of the frequency band, antenna directionality (gain), height of transmit and receive antennas, terrain between the antennas, interference, clutter, man-made obstructions, weather, type of modulation, and sensitivity of the receiver. Unlike a base/mobile system, however, the system designer can increase the distance of the path by increasing transmitter power or using a higher gain antenna as well as elevating the receive antenna. Point-to-multipoint microwave systems share many of the characteristics of point-to-point microwave systems, except that there are multiple receive antennas situated in an area of desired service and the transmitting antenna may not be as highly directional. In either case, as with base/mobile systems, increasing the transmitter power may cause unacceptable levels of interference to neighboring paths, or limit the number of paths in a particular area.

46. For example, in the theoretical case of a typical rural microwave path in the 6.8 GHz band, a 45 percent increase in transmitter output power yields only a one km (0.62 mi) increase in path length. We seek comment on whether the benefits of such a modest increase in path length outweigh the potential for unacceptable levels of interference to neighboring paths, or siting limitations on new paths in the same area.

47. We seek comment on whether it is beneficial, feasible, and advisable to increase the current power limits for stations located in rural areas licensed under parts 22, 24, 27, 80, 87, 90, and 101. A licensee can increase power by increasing transmitter output power and/or by using a directional antenna that focuses energy on the specific area to be covered and reduces energy in other directions, serving to limit interference potential, and potentially improving reception of signals from mobile units. Commenters should indicate which radio service(s) and power level(s) should be increased, specify a particular amount of additional power (either transmitter

output power, EIRP, or both), specify directional antenna parameters if applicable (e.g., front to back ratio or beamwidth), and quantify the benefits that one could expect from the power increase. In particular, we are interested in how such increases may increase the potential for unacceptable levels of interference to other stations, increase exposure to electromagnetic radiation for workers and consumers, or limit future use of the spectrum in such areas.

48. We also seek comment on how best to define the term "rural" for purposes of permitting increased power levels. In the case of base/mobile systems, would both the base stations and mobile stations need to be located in a rural area? For point-to-point and point-to-multipoint systems, would both ends of the transmission path need to be in a rural area? Rather than defining certain geographic areas as rural for these purposes, would some other measure (e.g., taking into account a combination of terrain and nearby spectrum usage) be more appropriate?

49. We also seek comment on other measures that licensees may be using to minimize the costs associated with serving rural areas, and whether our rules and policies are sufficiently flexible to facilitate and encourage such innovations. For example, cellular and PCS licensees in rural areas may be using tower top amplifiers to boost incoming mobile signals. Similarly, licensees may deploy "smart antenna" systems capable of increasing base station range and suppressing interference from unwanted sources.

E. Appropriate Size of Geographic Service Areas

1. Background

50. Over the past decade, the Commission has moved from the use of site-based licenses to the use of geographic areas for licensing commercial wireless services. In selecting the initial size of geographic service areas for licenses with mutually exclusive applications (and thus competitive bidding), section 309(j)(4)(C) directs the Commission to promote certain goals. Specifically, section 309(j)(4)(C) requires the Commission to, consistent with other objectives, prescribe service areas "that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applications, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and

rapid deployment of new technologies and services."

2. Discussion

51. We believe that the Commission's choice for the initial size of geographic service areas plays an important role in promoting a number of policy goals, including efficiency of spectrum use, competition among providers, and advancing service to rural areas. If geographic service area licenses are assigned with an initial size that does not represent the needs of service providers, then transaction costs are incurred, as carriers seek to acquire rights to spectrum in areas they wish to serve and divest their interest in areas they do not wish to serve. While we hope that the Commission's recent efforts to facilitate the development of secondary markets will make these transaction costs less burdensome, we recognize that some costs to moving spectrum to its highest valued use will remain.

52. Since it is costly to aggregate or disaggregate spectrum, it is important that the Commission select initial license sizes and boundaries that are appropriate for the likely users and services to be provided. We recognize that there are tradeoffs between the use of large service areas and small service areas. Large service areas provide economies of scale and reduce coordination costs. On the other hand, smaller service areas allow local, independent operators to better tailor their services to local conditions and provide greater financial incentives to local licensees than if they were managers in very large enterprises. Adopting small license areas also may allow smaller enterprises with limited financing to acquire spectrum licenses. In addition, license boundaries are also a concern of the Commission, which has attempted to choose boundaries that combine people and firms who are part of the same community and who are likely to communicate with each other. The Commission also has attempted to avoid setting boundaries that would preclude incumbents from bidding on licenses because of cross-ownership rules.

53. We recognize that carriers are divided on the issue of the appropriate size of geographic service areas. In various Commission proceedings, representatives of small, regional, and rural providers have argued that CMAs are the most appropriate size. In contrast, representatives of large regional and nationwide CMRS providers and other parties have argued that service areas that are too small may be inefficient. Still other parties have

argued that the size of service areas should be tailored to the wireless service in question.

54. We seek comment on the costs of partitioning post-auction as compared to the costs of aggregating spectrum during or after the auction process. We observe that spectrum aggregation within auctions is fairly common. While we recognize the concerns of small carriers regarding their access to spectrum in rural markets, especially when large geographic areas are used, we note that partitioning also is relatively common. Partitioning appears to be occurring across all regions of the country and includes many counties that fall within the various definitions of "rural" that are proposed above.

55. We seek comment on the lessons we should draw from the Commission's experience in choosing initial service area sizes. Is there evidence of net aggregation towards nationwide service areas for certain services such as cellular and PCS? Is there evidence of net partitioning for other services? To the extent partitioning is more common in some services and less so in others, is this trend indicative of some miscalculation by the Commission in choosing the initial size of service areas? Alternatively, could this activity reflect changes in the demand for services that could be provided in this band, or changes in technologies or other factors that affect what services could be supplied in this band? We also seek comment as to whether the difference in the level of partitioning across services could reflect the application of different Commission rules, such as build-out requirements. Finally, we note that there are certain transaction costs associated with any partitioning. Should we expect that licenses for highly valued spectrum, in highly valued services, will be more likely to be partitioned, given the greater likelihood that the value created by this trade will exceed the transaction costs? Similarly, as secondary markets develop and transaction costs decline, should we expect that partitioning through leasing arrangements will become more feasible in more services? To what extent might such partitioning be limited by a hold-out problem? That is, might licensees with large geographic areas refuse to make spectrum available to small providers that want to serve small or niche markets, which tend to be in rural areas?

56. We tentatively conclude that it is in the public interest for the Commission to balance the needs of different providers, including the larger carriers' need for economies of scale and the smaller carriers' need for license

areas that more closely resemble their service areas. We recognize that, since users of spectrum have a variety of needs, one size of service area does not fit all. We intend to continue establishing geographic areas on a service-by-service basis, and we seek comment on steps we can take to effectively balance the competing needs of different users as we make these service area decisions. Would such an approach produce economically efficient results? Is such an approach necessary, given our expectation that secondary markets will become more prevalent in the future? We especially encourage commenters to use empirical evidence to support their assessment of partitioning costs, aggregation costs, and the efficiency of any approach they recommend.

57. In addition, while the largest geographic service area the Commission may adopt would be a nationwide area, there is some question as to what would be the smallest size that would still be functional. That is, at what point is it more appropriate for the Commission to use site-based licenses instead of very small geographic area licenses? Also, to the extent we believe small license areas are appropriate for specific bands, what size is most appropriate? Are there particular frequencies that are better suited for allocations to small license areas? We also inquire as to whether it is possible that use of relatively small geographic areas would introduce an unreasonable risk of another type of hold-out problem. In particular, might such an approach result in many small incumbent licensees who could then frustrate post-auction attempts to aggregate licenses efficiently by refusing to sell except at excessive prices?

58. We also seek ways to make it easier for providers in need of larger areas to acquire them with minimal transaction costs. One way to achieve this objective may be to adopt bidding design mechanisms that permit the aggregation of geographic areas or spectrum blocks during an auction. Typically, the Bureau uses a simultaneous multiple-round auction design, which facilitates aggregation by making all licenses in the auction available at the same time. Recently, the Bureau selected a package bidding design for two auctions. This relatively new approach to auctions allows bidders to submit all-or-nothing bids on combinations of geographic areas or spectrum blocks in addition to bids on individual licenses or authorizations. We believe that, in instances in which the Commission has determined that smaller size license areas are appropriate, a package bidding format

may be helpful to bidders seeking to acquire larger geographic areas or spectrum blocks. We recognize, however, that in such circumstances, the use of package bidding may introduce significant computational complexities.

59. We also observe that choosing a geographic service area that represents a "middle solution" may be an inefficient approach. We note that, as an alternative to such a "middle solution" in which service area size represents a compromise that may not be ideal for either small or large service providers, there may be situations in which it is possible to create geographic service areas of mixed sizes. In particular, if there is sufficient bandwidth available, both large regional (or even national) and small local license areas can be created. We inquire as to whether such a mixed plan may reduce the aggregation/disaggregation transaction costs inherent in a single size geographic licensing scheme, and we seek comment on what other costs, as well as benefits, may be associated with such an approach. We recognize that, while a mixed approach may be useful in some bands with spectrum users that have very different needs, it may not be appropriate in other bands, and we conclude that our approach must be tailored to the needs of each band or service in question.

F. Facilitating Access to Capital

1. Rural Utilities Service

a. Rural Loan Programs

(i) Background

60. The U.S. Department of Agriculture's RUS Telecommunications Program assists the private sector in developing, planning, and financing the construction of telecommunications infrastructure in rural America. Programs administered by RUS include: (1) Infrastructure loans; (2) broadband loans and grants; (3) distance learning and telemedicine loans and grants; (4) weather radio grants; (5) local TV loan guarantees; and (6) digital translator grants. The largest of these programs are the infrastructure loan program and the broadband loan program.

61. The infrastructure loan program is technology neutral, requires broadband-capable facilities, and provides financing for infrastructure (e.g., building and equipment), but not financing for the costs of operating the business. Within the infrastructure loan program, there are four types of financing: (1) Hardship loans; (2) cost-of-money loans; (3) rural telephone bank loans; and (4) federal financing bank

loans. For fiscal year 2003, the total authorized loan level for these four programs is \$670 million.

62. The broadband loan program is technology neutral; requires provision of high-quality data transmission service and may provide voice, graphics, and video; and must enable a subscriber to transmit and receive at a rate of no less than 200 kilobits per second. Similar to the infrastructure loan program, the broadband loan program finances the construction or acquisition of new facilities and facility improvements. RUS makes broadband loans available to any legally organized entity that has sufficient authority to enter into a contract with RUS and carry out the purposes of the loan, so long as the entity is providing or proposes to provide service to an area that meets the following criteria: (1) There are no more than 20,000 inhabitants, and (2) the service area does not fall within a standard metropolitan statistical area. For fiscal year 2003, RUS has \$80 million for 4 Percent loans, \$80 million for Guaranteed loans, and \$1.3 billion for Treasury Rate loans. In fiscal year 2004, the total loan level is anticipated to be \$418 million.

63. The Commission's Wireless Telecommunications Bureau (WTB) has partnered with RUS to sponsor the "Federal Rural Wireless Outreach Initiative" (FCC/RUS Outreach Partnership). The FCC/RUS Outreach Partnership is designed to exchange program and regulatory information about rural development and wireless telecommunications access in rural areas. The four key goals of the FCC/RUS Outreach Partnership are to: (1) Exchange information about products and services each agency offers to promote the expansion of wireless telecommunications services in rural America; (2) harmonize rules, regulations and processes whenever possible to maximize the benefits for rural America; (3) educate partners and other agencies about Commission, WTB and USDA/RUS offerings; and (4) expand the FCC/WTB and USDA/RUS partnership, to the extent that it is mutually beneficial, to other agencies and partners.

(ii) Discussion

64. We seek methods to help facilitate access to capital in rural areas in order to increase the ability of wireless telecommunications providers to offer service in rural areas. An important part of accomplishing this goal is through the promotion of federal government financing programs. We seek comment on how the Commission can assist in making the RUS loan programs more

effective. We seek comment on whether there are any Commission regulations or policies that should be reexamined or modified to facilitate participation in the RUS programs by wireless licensees and service providers. In addition, we ask for comment on whether the FCC/RUS Outreach Partnership could be expanded to include other federal, state, or local government programs and, if so, which programs. We further seek comment on whether there is a role for non-governmental entities in the FCC/RUS Outreach Partnership and how such entities might be able to participate. We also ask for suggestions regarding effective outreach programs and the groups that should be targeted. In addition, we ask for submission of lists of associations, government agencies, or other interested parties that would want to join in this FCC/RUS Outreach Partnership or receive future information regarding this program.

b. Security Interests

(i) Background

65. As a historical matter, the Commission has not permitted third parties to take a security interest in spectrum licenses. At the same time, the Commission's legal and policy bases for various restrictions on transactions involving licenses have evolved over the years. For instance, at one time, the policy of prohibiting the sale of bare licenses, as well as the policies against security and reversionary interests in licenses, were based on the Commission's interpretation of the Communications Act. In various decisions, the Commission modified its views on the statutory basis for these policies in the context of cellular and other wireless licenses. For all spectrum-based services, the Commission has expressly permitted licensees to grant security interests in the stock of the licensee, in the physical assets used in connection with its licensed spectrum, and in the proceeds from operations associated with the licensed spectrum. The Commission and the courts have likewise determined that security interests in the proceeds of the sale of a license do not violate Commission policy. In connection with the auction installment payment program, the Commission itself has taken an exclusive security interest in licenses subject to installment payments and a senior security interest in the proceeds of a sale of an auctioned license. In its *Secondary Markets Policy Statement*, the Commission considered ways in which licensees may be able to maximize their efficient use of spectrum by leveraging "the value of their

retained spectrum usage rights to increase access to capital." See *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, WT Docket No. 00-230, *Policy Statement*, 65 FR 81475 (December 26, 2000) (*Secondary Markets Policy Statement*). Specifically, the Commission said "we plan to evaluate our policies prohibiting security and reversionary interests in licenses."

(ii) Discussion

66. Pursuant to our stated intent in the *Secondary Markets Policy Statement*, we initiate a discussion regarding whether we should permit RUS to obtain security interests in the spectrum licenses of their borrowers. We seek comment on whether, and to what extent, licensees in rural areas would benefit from the opportunity to pledge their licenses to RUS as collateral as a means of overcoming their difficulties in raising capital.

67. As an initial matter, we limit the scope of our inquiry to commercial and private terrestrial wireless services. We further limit our inquiry concerning security interests to licenses and licensees in rural and underserved areas that are seeking federal financial assistance through RUS loan programs. We believe that such licensees will benefit most in light of their apparently greater need for lower-cost capital and the new opportunities presented by RUS loans discussed below. Also with regard to the scope of our inquiry, we note that we do not intend to implement any policy change that would, in the case of a licensee operating under the installment payment program, compromise the Commission's exclusive or senior secured position with respect to the license and the proceeds of the sale of such license. Nevertheless, we seek comment on whether permitting RUS to obtain security interests in the spectrum licenses of their borrowers, as described below, could have unintended effects on installment licensees and the Commission's rights under these arrangements.

68. Our primary goal is to determine whether further relaxation of the security interest restrictions—by allowing at least a modified form of collateralization of FCC licenses by licensees obtaining RUS funds—could increase opportunities to raise capital or avoid financial collapse. We therefore seek comment on the extent to which a licensee's ability to grant RUS a security interest directly in an FCC license would, in fact, create new financing opportunities and facilitate the

construction, deployment and continuity of new and existing wireless services in rural and underserved areas. We also ask how this change in our policy would affect the ability of small businesses to obtain much needed startup capital.

69. On the other hand, despite these potential benefits, we recognize that a licensee's current ability to grant security interests in its stock and in the proceeds of a license sale may already provide it with financing opportunities that are similar to those we seek to foster by our proposal below. If so, it would appear that we may not significantly enhance financing opportunities. We ask all interested parties, including licensees, vendors, RUS, lenders and others to comment on these potential benefits and to identify any other specific benefits that could accrue from such a policy change.

70. We further note that any security interest granted to RUS would be expressly conditioned, in writing as part of all applicable financing documents, on the Commission's prior approval of any assignment of the license or any transfer of *de jure* or *de facto* control of the licensee to RUS. We discuss below the reasons for this limitation and seek comment on some specific concerns.

71. First, in addition to the benefits from lower costs of and greater access to capital, we seek comment on whether modifying our policy to permit RUS to take a security interest in FCC licenses is a natural outgrowth of the Commission and judicial developments discussed above, which recognize the value and ability of a lender obtaining a security interest in the licensee's stock, proceeds and other assets without infringing upon the Commission's statutory obligations. For instance, in *MLQ Investors, L.P. v. Pacific Quadracasting, Inc.*, 146 F.3d 746 (9th Cir. 1998), the U.S. Court of Appeals for the Ninth Circuit determined that a security interest in the proceeds of the sale of a broadcast license can be perfected prior to the sale of the license, and that "[g]overnment licenses, as a general rule, are considered to be 'general intangibles' under the Uniform Commercial Code, 'i.e., personal property interests in which security interests may be perfected.'" The Ninth Circuit identified the Commission's primary policy concern by stating that "[t]he FCC may prohibit security interests in licenses themselves because the creation of such an interest could result in foreclosure and transfer of the license without FCC approval." The Ninth Circuit went on to explain that the Commission's interest in regulating spectrum to promote the public interest

is not implicated "by a security interest in the proceeds of licenses, which does not grant the creditor any power or control over the license." We also note that application of state laws under Article 9 of the Uniform Commercial Code is generally limited in connection with the treatment of security interests of non-assignable "personal property" governed by federal law. We seek comment on how cases like *MLQ Investors* and the application of the UCC provisions have affected lending practices for FCC licensees and what, if any, impact the grant of security interests in spectrum licenses to RUS might have on established law in this area, including the appropriate method of how RUS would perfect a security interest in FCC licenses.

72. Next, we address the concerns that have led us to propose that any security interest granted to RUS be expressly conditioned on the Commission's prior approval of any assignment of the license or any transfer of *de jure* or *de facto* control. We ask whether it may be feasible for a licensee to grant RUS a security interest in an FCC license without compromising our obligation to maintain control of spectrum in the public interest, so long as we are completely able to fulfill our applicable mandates under the Communications Act of 1934, as amended. For example, we must and will preserve our authority under section 310(d) to review and approve license assignments and transfers of control, to assess and confirm the basic qualifications of assignees and transferees, and, more generally, to exercise our statutory responsibility to determine whether the section 310(d) transaction in question will serve the public interest, convenience and necessity. The Commission has historically disallowed granting security interests in FCC licenses, based upon its concern that such financing arrangements may interfere with its ability to regulate the assignment of licenses, the transfer of control over licenses, and, more generally, the use of spectrum. If, however, we can ensure that appropriate prior approval of assignments and transfers is obtained, and if we further limit any grant of a security interest to RUS, a federal loan agency, do commenters believe that our policy and statutory concerns would be satisfactorily addressed, thus enabling us to promote flexibility and financing opportunities for licensees serving rural and underserved areas? In this regard, we note that we have seen no detectable erosion of our regulatory authority from our current policy of permitting

licensees to engage in a very similar type of financing arrangement—that is, a licensee grant of a third party security interest in its stock and the proceeds of the sale of the license, along with third party perfection of that interest, prior to the sale of the subject license. We seek comment on the relative impact that such developments may have on our ability to implement and enforce our statutory obligations.

73. We recognize that permitting RUS to obtain security interests in FCC licenses would provide RUS with greater rights vis-à-vis the licensee and licensee than it currently can obtain. We therefore ask whether our proposed condition requiring prior FCC approval before RUS can foreclose on the license would satisfactorily and adequately preserve existing regulatory relationships. The type of security interest that we are seeking comment on would be a right between the licensee and RUS, exercisable only upon Commission approval. Would such a right be fully consistent with our responsibilities under the Communications Act? We ask whether it would not be different than granting RUS an option to purchase a license, for example. We note that we would review and require our approval of an assignment to RUS in accordance with our transfer and assignment policies before RUS could assume control of a license. Such a process is designed to ensure that the federal government retains appropriate control over use of the spectrum consistent with sections 301 and 304 of the Act, and that the perfection of a security interest in a license does not interfere with these or other statutory obligations and policy prerogatives. For example, would a security interest in a license give RUS any rights that might conflict with the Commission's regulatory oversight (other than an unapproved foreclosure or assertion of control) that it could exercise against the licensee? Furthermore, in light of the fact that RUS is a federal government agency, we ask whether we may have greater statutory latitude to grant it a security interest while still ensuring that the federal government retains control over spectrum.

74. Our next concern relates to any unintended consequences that may result from this potential policy change, especially as it relates to existing and future financial and regulatory relationships and any new claims or conflicts that may arise. It appears that one of the main conceptual differences between the current limits on the scope of permissible security interests and our proposal is that a security interest in a

license itself would link the secured party more directly to the Commission. It is our understanding that under current financing practices involving FCC licensees, the secured party's rights stem from its relationship as a lender (and possibly an equipment vendor, bondholder or stockholder) to the licensee, not directly to the Commission, even after default and foreclosure on the secured assets. We seek comment on whether the grant by a licensee of a contingent interest in a Commission authorization to RUS—without the Commission's permission or review—would undermine our regulatory authority embodied in sections 301 and 304. We also ask how the existence of RUS, as a secured creditor, may affect the ability of the licensee to seek financing from other sources in this situation? In sum, we seek comment on what, if any, difference from the perspective of RUS, a third-party lender, or the licensee, would there be on a relaxation of the current security interest policies in the circumstances described above.

75. Finally, we seek comment on one other concern that had been raised in the past by the Commission in connection with prior similar proposals. In particular, in the context of broadcast licenses, the Commission expressed concern about the independence of broadcast stations and about the ability of creditors to have substantial influence over a borrower station. We seek comment on whether such dangers exist in the connection with RUS's attainment of security interests in non-broadcasting wireless licenses, especially as it relates to preserving and protecting facilities-based competition and innovation by and among wireless service providers.

2. Cellular Cross-Interests in Rural Service Areas

a. Background

76. Section 22.942 of the Commission's rules substantially limits the ability of parties to have interests in cellular carriers on different channel blocks in the same rural geographic area. To the extent licensees on different channel blocks have any degree of overlap between their respective cellular geographic service areas (CGSAs) in an RSA, section 22.942 prohibits any entity from having a direct or indirect ownership interest of more than 5 percent in one such licensee when it has an attributable interest in the other licensee. An attributable interest is defined generally to include an ownership interest of 20 percent or more or any controlling interest. An

entity may have a non-controlling and otherwise non-attributable direct or indirect ownership interest of less than 20 percent in licensees for different channel blocks in overlapping CGSAs within an RSA.

77. The Commission initiated a comprehensive review of the cellular cross-interest rule in January 2001 as part of its 2000 biennial regulatory review of spectrum aggregation limits. In December 2001, pursuant to section 11 of the Communications Act, the Commission released its *Spectrum Cap Sunset Order* and, on the basis of the state of competition in CMRS markets, sunset the CMRS spectrum cap rule in all markets effective January 1, 2003. See 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, WT Docket No. 01-14, *Report and Order*, 67 FR 1626 (Jan. 14, 2002) (*Spectrum Cap Sunset Order*). In that order, the Commission also determined that cellular carriers in urban areas no longer enjoyed first-mover, competitive advantages, and it therefore eliminated the cellular cross-interest rule in MSAs on that basis, also pursuant to section 11 of the Act. While the Commission left the cross-interest rule in place in RSAs, it indicated that it would consider waiver requests and reassess the need for the rule at a future date.

78. In March 2002, the Commission sought comment on petitions filed by Dobson Communications Corporation, Western Wireless Corporation, and Rural Cellular Corporation (Dobson/Western/RCC) and Cingular Wireless LLC (Cingular) seeking reconsideration of the decision in the *Spectrum Cap Sunset Order* to retain the cellular cross-interest rule in RSAs. Petitioners and commenting parties focused on the sufficiency of the competitive market analysis underlying the decision to retain the cellular cross-interest rule in RSAs, as well as the consequences of relying on case-by-case review to examine cellular competition in rural areas. Parties also asserted that the waiver process established in the *Spectrum Cap Sunset Order* creates regulatory uncertainty and discourages potential transactions and financing that could benefit rural consumers. These petitions remain pending and are being consolidated into the instant rulemaking.

79. In its December 2002 *Rural NOI*, the Commission sought comment on the cellular cross-interest rule as it reviewed its policies to encourage the provision of wireless services in rural areas. The Commission received comments supporting either modification or elimination of the rule so as to facilitate

investment and financing arrangements for rural cellular providers.

b. Discussion

80. We seek comment on whether the continued application of the cellular cross-interest rule in all RSAs may impede market forces that drive investment and economic development in rural areas. The recent downturn in telecommunications markets, worsening financial condition of many carriers, and the ongoing need for capital investment to keep up with technological and regulatory changes, has made it more difficult for wireless carriers, especially those serving rural areas, to obtain financing. In light of the foregoing, we seek comment regarding whether we should modify the cellular cross-interest rule to promote investment while protecting against potential competitive harms. Specifically, we tentatively conclude to retain the cellular cross-interest rule as it applies only in RSAs with three or fewer CMRS competitors and we seek comment on removing the rule as it applies to other RSAs and to non-controlling investments in all RSA licensees.

81. In the *Spectrum Cap Sunset Order*, the Commission concluded that it would be more efficient and less costly to the Commission to maintain a prophylactic cross-interest rule applicable to all RSAs and to entertain waiver requests for the small subset of transactions in RSAs where competition was more robust. As a consequence of that decision, cellular licensees in MSAs are free to procure financing that involves ownership interests that fall below the threshold that triggers the cross-interest rule, while cellular licensees in all RSAs are not. While the Commission attempted to address this barrier to investment in rural areas by providing a specific waiver process, the transactions costs and regulatory uncertainty surrounding any waiver procedure may deter some beneficial investment in these areas.

82. We seek comment on whether changing the cellular cross-interest rule for RSAs that enjoy a greater degree of competition will spur needed investment in these rural areas and foster even more competition in others. As an initial matter, we seek comment regarding what constitutes a "competitor" for purposes of this rule. We also seek comment regarding whether, in the event we do eliminate the cellular cross-interest rule for RSAs with greater than three competitors, we should adopt a transition period after which time the rule would sunset for these RSAs. In the event that

commenters support such a sunset period, we seek comment regarding the appropriate length of the sunset period.

83. We also ask commenters for additional suggestions regarding how we may modify our cellular cross-interest rule to promote investment in rural areas while retaining adequate competitive safeguards. For example, should we eliminate the cellular cross-interest restriction for all RSAs where the ownership interest being transferred, assigned or acquired is not a controlling interest (*i.e.*, where the interest is a non-controlling interest and where the transaction otherwise would not require prior FCC approval)? We ask parties to focus their comments on the effect of the cross-interest rule on licensees' acquisition of adequate capital in these areas. Commenters supporting our proposal should identify and discuss specific past instances in which they have had difficulty obtaining financing in rural areas due to the cellular cross-interest rule. We also request parties to provide examples of the extent to which the waiver process has deterred or prevented acquisition of capital in a rural market(s). We seek specific market data and historical examples to assist our public interest determination of the extent to which application of the cellular cross-interest rule in RSAs impedes market forces that drive development in these rural and underserved areas.

84. We also seek comment on whether extension of the case-by-case review, as established in the *Spectrum Cap Sunset Order*, will promote investment and is sufficient to safeguard competition in RSAs with more than three competitors. Although we recognize the role that the cellular cross-interest rule has provided in the past against the possibility of significant additional consolidation of cellular providers in rural areas, we ask whether the public interest may be better served by the benefits of pure case-by-case review. In the *Spectrum Cap Sunset Order*, the Commission concluded that case-by-case review under section 310(d) of the Act, properly performed and with appropriate enforcement mechanisms, allows greater regulatory flexibility and greater attention to the actual circumstances of a particular transaction, thus promoting economic efficiency by reducing the possibility both of approving secondary market transactions that are not in the public interest and of impeding transactions that are actually in the public interest. In the markets still covered by the cellular cross-interest rule, for example, the rule prevents the two cellular licensees from merging regardless of the

competitive circumstances in a given market, but does not prevent one cellular licensee from merging with a PCS licensee, even though the competitive effect of both transactions might be very similar. We seek comment on whether this inequity may distort the market in any area in which more than just the two cellular licensees are operating and whether the better approach to safeguarding competition is to take account of the particular circumstances of each market through case-by-case competitive review.

G. Infrastructure Sharing

1. Background

85. Both in the United States (U.S.) and the European Union (EU), commercial wireless providers have sought to minimize their capital expenditures and maximize their coverage by engaging in joint ventures with other providers to share infrastructure costs. Such arrangements are generally known as "infrastructure sharing," and they can take place at various levels. At the most basic level is sharing of passive elements such as antennas and towers, followed by sharing of active or "intelligent" elements of the networks such as switches and nodes, followed by sharing of spectrum.

86. In the United States, several infrastructure sharing arrangements have been announced in the past two years. The providers claim that such infrastructure sharing will allow them to cover a larger geographic area at lower cost. In addition, because two or more providers share the infrastructure, these arrangements may allow for more providers to serve a market than otherwise would be possible. Finally, to the extent that these arrangements make it possible for providers to cover a larger geographic area, and thus serve a greater number of consumers, they may provide an important public interest benefit.

87. Infrastructure sharing arrangements that do not involve a transfer of control, as defined under section 310(d), do not require Commission review. Infrastructure sharing arrangements that do involve a transfer of control, like other arrangements, require Commission review. Also, while previous infrastructure sharing arrangements have not required Commission review, the Commission has taken no regulatory action to either promote or create incentives for parties to enter into such arrangements.

88. As compared to the U.S. market, infrastructure sharing has received more attention from regulators in the EU and

its Member States. Within the past year, the European Commission announced a preliminary conclusion to favorably view two agreements for the provision of 3G services, one in the United Kingdom and one in Germany. The European Commission noted that these arrangements should allow for faster rollout of service and greater coverage, especially in remote and rural areas.

2. Discussion

89. As noted earlier, because of the lower population density and smaller customer base found in rural areas, the economically efficient number of providers for these markets will be fewer than that for urban markets. Because infrastructure sharing helps lower capital costs and thus extend the coverage of providers, this practice may be particularly important in rural areas, for which geographic coverage is especially important. In addition, because infrastructure sharing may make it possible for more providers to operate in a given area, this practice again is important for rural markets that tend to have fewer competitors.

90. We continue to believe that, under certain circumstances, licensees should be able to engage in infrastructure sharing in order to further promote service in these markets. Thus, for infrastructure sharing in rural areas that involve no transfer of control, as defined by section 310(d), there are no requirements for Commission pre-clearance. For infrastructure sharing arrangements in rural areas that involve a transfer of control, we will maintain section 310(d) review. We note that in the *Secondary Markets* proceeding we have significantly streamlined the transfer of control and assignment process, and we inquire as to whether there are other steps we should consider to further streamline this process.

91. We seek comment on the extent to which infrastructure sharing may promote service in rural markets. Are there particular types of infrastructure sharing arrangements that may be most effective in promoting this goal? Are there specific policy steps we should take as a regulatory matter to promote infrastructure sharing arrangements that, in turn, promote service in rural areas? We encourage comments from providers involved in infrastructure sharing in the U.S. and EU as well as those familiar with such arrangements.

92. We also seek comment on the potential costs and benefits of this proposed policy. With regard to the potential benefits, we note that comments by European Commission regulators in support of such arrangements in the E.U. generally focus

on the ability of carriers to lower costs and increase their coverage area, especially to rural markets. Can we assume similar benefits for rural areas in the U.S.? We recognize that the Commission has stressed the value of facilities-based competition, and that infrastructure sharing by definition limits competition between two potential competitors. We seek comment on the factors we should consider in evaluating infrastructure sharing arrangements that require section 310 approval so as to effectively balance promoting competition among providers and promoting expanded coverage in rural areas.

93. In addition, we recognize that, as in the case of secondary market spectrum leasing, infrastructure sharing may require reconsideration of our regulatory definitions of spectrum use. As described above, we propose that licensees that make their spectrum in rural areas available to other parties via secondary markets are, in a sense, using that spectrum. Should we similarly consider spectrum involved in infrastructure sharing arrangements to be "used" and thus not subject to re-licensing or any other mechanism to make the spectrum available to third parties?

H. Rural Radiotelephone Service and Basic Exchange Telecommunications Radio Service

1. Background

94. The Rural Radiotelephone Service (RRS) was established to permit the use of certain VHF and UHF spectrum to provide radio telecommunications services, in particular, basic telephone service, to subscribers in locations generally deemed so remote that traditional wireline service or service by other means is not feasible. The RRS operates in the paired 152/158 MHz and 454/459 MHz bands, which are also used by paging services. In 1987, the Commission adopted rules that authorized the establishment of the Basic Exchange Telecommunications Radio Service (BETRS) within the RRS. BETRS is authorized in the same paired spectrum bands as RRS and in addition, on fifty channel pairs in the 816–820/861–865 MHz band. BETRS, which is essentially a type of technology used to provide RRS, utilizes a digital system that is more spectrally efficient than traditional analog RRS, provides private calling, and has a much lower call blocking rate than RRS. Only local exchange carriers that have been state certified to provide basic exchange telephone service (or others having state approval to provide such service) in the

pertinent area are eligible to hold authorizations for BETRS.

95. The *BETRS R&O* provided that traditional RRS and BETRS would be co-primary with other services that were authorized to use the same spectrum. See Basic Exchange Telecommunications Radio Service, CC Docket No. 86–495, *Report and Order*, 53 FR 3210 (February 4, 1988) (*BETRS R&O*). Prior to the establishment of BETRS, RRS was licensed on a secondary, non-interfering basis. In 1997, the Commission established rules to auction the 152/158 MHz and 454/459 MHz bands and issue paging licenses on a geographic basis. As a result, existing RRS and BETRS licensees authorized for these spectrum bands were afforded protection as incumbent licensees and could continue operating on a primary basis. However, we indicated that subsequent RRS and BETRS licenses in these bands would be issued on a secondary basis to the geographic area licensee. Similarly, in 1997, the Commission established rules to auction the 816–820/861–865 MHz bands and issue SMR licenses on a geographic basis. As a result, existing BETRS licensees authorized in the 800 MHz band were afforded protection as incumbent licensees and could continue operating on a primary basis. Again, we indicated subsequent BETRS licenses in these bands would be issued on a secondary basis to the geographic area licensee. Today new RRS and BETRS licenses are issued on a secondary, non-interfering basis.

2. Discussion

96. We seek to establish a more complete record regarding these services in order to allow us to determine if certain rules and policy changes are needed to facilitate the use of RRS and BETRS. As discussed below, we seek comment on whether: (1) There is a current demand for RRS and BETRS; (2) other wireless services have supplanted RRS and BETRS as alternatives to wireline service; (3) access to spectrum is a limiting factor for RRS and BETRS and (4) current Commission rules and policies are prohibiting/limiting the effectiveness of RRS and BETRS to provide service in rural areas.

97. As an initial matter, we would like to determine the level of demand for RRS and BETRS. We reviewed licensing data, locations where basic exchange service does not appear to be available, and the availability of equipment for RRS and BETRS. It appears, on the surface, certain areas that do not have basic telephone service might benefit from RRS or BETRS. For example, we note that no RRS or BETRS facilities are

licensed in Mississippi, which according to 2000 Census data, has the lowest household telephone penetration rate in the U.S. In addition, we cannot find evidence that 800 MHz BETRS equipment has ever been manufactured and made available in the U.S. Furthermore, we only found one company that claimed it provided new RRS and BETRS equipment. We seek comment on whether there is still a demand for RRS and BETRS, beyond what is currently offered, and whether RRS and BETRS are viable options in the provision of basic telecommunications services. If there is a demand for these services, are there ways that RRS and BETRS could be used more efficiently and/or effectively?

98. If there is a demand for basic communications services, other than wireline, and it is not being met using traditional RRS and BETRS spectrum, we are interested in exploring how the demand is being met. The Commission has embraced policies that provide many wireless licensees with added flexibility in providing various types of services (*i.e.*, fixed or mobile/voice or data). It is now possible that services (*i.e.*, basic exchange service) previously offered only by RRS and BETRS licensees could be offered by licensees in other wireless services, using other spectrum bands. Furthermore, it is possible with the proliferation of mobile telephony throughout the country, individuals that in the past would have been a prime candidate to receive RRS or BETRS may now have access to a mobile telephone that is the sole telephone used within a household. We are not able to determine how many licensees are providing basic exchange service to rural areas using alternative spectrum or how many licensees are providing services (*i.e.*, mobile telephony) and therefore could negate the need for RRS or BETRS in particular areas. We therefore seek comment on the effectiveness of non-RRS and BETRS licensees in providing the same services or alternative services in lieu of RRS and BETRS. Furthermore, we seek comment on whether additional flexibility is necessary in order to fully exploit capabilities of licensees in this context? In addition, we seek comment regarding to what, if any, extent unlicensed spectrum is being used to provide services that have traditionally been provided by RRS and BETRS licensees.

99. In some instances, there may be a demand for a service; however, access to the spectrum needed to provide such services may not be readily available. We noted in the *Secondary Markets* proceeding that facilitating spectrum

leasing arrangements permits additional spectrum users to gain access to spectrum. Furthermore, several commenters in the *Secondary Markets* proceeding specifically indicated that facilitating leasing arrangements would increase service offerings to rural customers by enabling rural telephone companies and others to access underutilized spectrum. We seek comment on whether there is a problem for potential providers of RRS or BETRS in accessing spectrum and if so, whether parties feel secondary markets will provide the appropriate means for access to the desired spectrum.

100. We are also interested in determining if the Commission's current rules and policies for RRS and BETRS are limiting factors towards a more expansive use of these services. We note that currently there is an eligibility restriction for BETRS that restricts the issuance of a license to only those entities that receive state approval to provide basic exchange telephone service. We believe that this rule may be unnecessary and may serve as a potential regulatory hurdle towards a more rapid and efficient use of the BETRS spectrum. We therefore propose to remove the eligibility restrictions contained within section 22.702 of our rules regarding state approval prior to the issuance of a BETRS license. Furthermore, the current service rules for RRS and BETRS provides that new licenses are issued on a secondary, non-interfering basis. In a Petition for Rulemaking filed by several parties, which eventually lead to the establishment of BETRS, a request was made to provide 2 MHz of dedicated spectrum for the use of BETRS. At the time, we determined that the demand for BETRS was not clear and therefore made the decision not to provide discrete spectrum for the use of BETRS. However, we indicated that if the spectrum that was made available for BETRS proved to be insufficient at a future date, we would revisit the problem at that time. We note that in the *Rural NOI* we sought comment on how we might revise existing RRS and BETRS rules to further facilitate the provision of wireless services to rural areas. We did not receive any comments that specifically addressed the need to revise RRS or BETRS rules. We seek comment on our proposal to remove the eligibility restrictions in section 22.702 of the Commission's rules for BETRS licensees. Based on the current RRS and BETRS licensing scheme, we seek comment on whether there is a need for us to expand the secondary status for RRS and BETRS to other spectrum

bands in order to facilitate and encourage construction in rural areas. If so, what spectrum bands could RRS and BETRS be expanded to include? If additional spectrum should be designated on a primary basis for BETRS, what band(s) would be viable? How much spectrum would be needed? Is there existing equipment or equipment that can be manufactured and made readily available for use in the band(s)?

101. As a final matter, and in light of the Commission's policies towards a more flexible-use, market-based approach to spectrum management, we believe it is appropriate at this time to determine if the current designation of RRS and BETRS as fixed services creates disincentives towards a more expansive use of the spectrum. We seek comment on whether providing additional flexibility to allow other types of service offerings using RRS and BETRS spectrum on a secondary basis would provide the proper incentives for these spectrum bands to be more fully utilized in providing telecommunications services to rural areas. If a more flexible use policy were created for RRS and BETRS, what considerations must the Commission consider in adopting rules and policies to facilitate such flexible use?

III. Procedural Matters

A. *Ex Parte* Rules—Permit-But-Disclose Proceeding

102. This is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 CFR 1.1202, 1.1203, and 1.1206.

B. Initial Regulatory Flexibility Analysis

103. As required by the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible impact on small entities of the proposals in the *NPRM*. The IRFA is set forth below. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *NPRM*, and they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Commission's Consumer Information Bureau, Reference Information Center, will send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief

Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act. *See* 5 U.S.C. 603(a).

Need for, and Objectives of, the *NPRM*

104. In this *NPRM*, we continue to examine ways of amending our regulations and policies governing the electromagnetic spectrum and the facilities-based commercial and private wireless services that rely on spectrum, in order to promote the rapid and efficient deployment of these services in rural areas. This *NPRM* builds upon the work of our Notice of Inquiry, in which we sought comment on how we could modify our policies to encourage the provision of wireless services in rural areas. This *NPRM* also draws upon the efforts and recommendations of the Spectrum Policy Task Force, which identified and evaluated potential changes in our spectrum policy that would increase public benefits from spectrum-based services. This *NPRM* proposes several ways in which the Commission can modify and improve its regulations and policies in order to promote such wireless service within rural areas while simultaneously removing any disincentives or other barriers to construction and operation in rural areas.

105. As a complement to the measures the Commission has already taken, we seek to minimize regulatory costs and eliminate unnecessary regulatory barriers to the deployment of spectrum-based services in rural areas. As reflected in the proposals set forth in this *NPRM*, we believe there are additional spectrum policy initiatives the Commission can adopt to reduce the overall cost of regulation and increase flexibility in a manner that will facilitate access, capital formation, build-out and coverage in rural areas. Specifically, in this *NPRM*, we seek comment on the appropriate definition of what constitutes a "rural area" for the purposes of this proceeding. We also seek comment on how to define "built" spectrum and we inquire as to whether the most efficient approach may be to rely on providers' filings of their construction notifications, an approach used with broadband PCS. Notably, we propose that spectrum in rural areas that is leased by a licensee, and for which the lessee meets the performance requirements that are applicable to the licensee, should be construed as "used" for the purposes of this proceeding and any performance requirements we adopt. Furthermore, we seek comment on ways the Commission could modify its regulations pertaining to unused spectrum.

106. In this *NPRM*, we propose the adoption of a “substantial service” construction benchmark during the initial license term for all wireless services that are licensed on a geographic area basis and that are subject to performance requirements. We also propose a substantial service safe harbor for rural areas. We also seek comment on whether we should adopt a geography-based benchmark for wireless services that are licensed on a geographic area basis and that currently do not have a geographic area coverage option. In addition, we seek comment on whether we should impose performance requirements in subsequent license terms after initial renewal. We also seek comment on measures that may be taken to increase power flexibility for licensed services. We also seek comment as to the relative effect on service in rural areas of the Commission’s use of small versus large geographic service areas.

107. In this *NPRM*, we seek comment on what, if any, regulatory or policy changes should be made to complement the Rural Utilities Service’s (RUS) financing programs. We also ask whether we should allow RUS to take security interests in spectrum licenses, provided that any security interest is expressly conditioned on the Commission’s prior approval of any assignment of the license from the licensee to the secured party. We also seek comment on whether we should eliminate the cellular cross-interest rule in Rural Service Areas with greater than three competitors, and we seek comment on what should constitute a “competitor.” In addition, we seek comment on whether clarifying the Commission’s policy on infrastructure sharing may promote service in rural areas. Finally, we propose ways of modifying our rules governing Rural Radiotelephone Service (RRS) and Basic Exchange Telephone Radio Systems (BETRS) to expand the use of these services, including removing eligibility restrictions on the use of BETRS spectrum.

Legal Basis

108. We tentatively conclude that we have authority under sections 4(i), 11, 303(r), 309(j) and 706 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 157, 161, 303(r), and 309(j), to adopt the proposals set forth in the *NPRM*.

Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

109. The RFA directs agencies to provide a description of, and where

feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. A “small business concern” is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

110. Cellular Licensees. The SBA has developed a small business size standard for small businesses in the category “Cellular and Other Wireless Telecommunications.” Under that SBA category, a business is small if it has 1,500 or fewer employees. According to the Bureau of the Census, only twelve firms out of a total of 1,238 cellular and other wireless telecommunications firms operating during 1997 had 1,000 or more employees. Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers are small businesses under the SBA’s definition.

111. 220 MHz Radio Service—Phase I Licensees. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to “Cellular and Other Wireless Telecommunications” companies. This category provides that a small business is a wireless company employing no more than 1,500 persons. According to the Census Bureau data for 1997, only twelve firms out of a total of 1,238 such firms that operated for the entire year, had 1,000 or more employees. If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA’s small business standard.

112. 220 MHz Radio Service—Phase II Licensees. The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. In an order relating

to this service, we adopted a small business size standard for defining “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. This small business standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years. The SBA has approved these small size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. In the first auction, 908 licenses were auctioned in three different-sized geographic areas: Three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses. A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.

113. Lower 700 MHz Band Licenses. We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years. Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. The SBA has approved these small size standards. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area

Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 CMA licenses. Seventeen winning bidders claimed small or very small business status and won sixty licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.

114. Upper 700 MHz Band Licenses. The Commission released an order authorizing service in the upper 700 MHz band. This auction, previously scheduled for January 13, 2003, has been postponed.

115. Paging. In a recent order relating to paging, we adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. The SBA has approved this definition. An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. An auction of Metropolitan Economic Area (MEA) and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold. 132 companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses. Currently, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service*, 608 private and common carriers reported that they were engaged in the provision of either paging or "other mobile" services. Of these, we estimate that 589 are small, under the SBA-approved small business size standard. We estimate that the majority of private and common carrier

paging providers would qualify as small entities under the SBA definition.

116. Broadband Personal Communications Service (PCS). The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years. For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.

117. Narrowband PCS. The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of \$40 million or less. Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in an order relating to narrowband PCS. A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million. The SBA has approved these small business size standards. A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and

nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

118. Specialized Mobile Radio (SMR). The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than \$15 million in each of the three previous calendar years. The Commission awards "very small entity" bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

119. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed "small business" status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

120. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these

providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by the SBA.

121. Private Land Mobile Radio (PLMR). PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we could use the definition for "Cellular and Other Wireless Telecommunications." This definition provides that a small entity is any such entity employing no more than 1,500 persons. The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. Moreover, because PLMR licensees generally are not in the business of providing cellular or other wireless telecommunications services but instead use the licensed facilities in support of other business activities, we are not certain that the Cellular and Other Wireless Telecommunications category is appropriate for determining how many PLMR licensees are small entities for this analysis. Rather, it may be more appropriate to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.

122. The Commission's 1994 Annual Report on PLMRs indicates that at the end of fiscal year 1994, there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Because any entity engaged in a commercial activity is eligible to hold a PLMR license, the revised rules in this context could potentially impact every small business in the United States.

123. Fixed Microwave Services. Fixed microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. Currently, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a

small business with respect to microwave services. For purposes of this IRFA, we will use the SBA's definition applicable to "Cellular and Other Wireless Telecommunications" companies—that is, an entity with no more than 1,500 persons. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer small common carrier fixed licensees and 61,670 or fewer small private operational-fixed licensees and small broadcast auxiliary radio licensees in the microwave services that may be affected by the rules and policies adopted herein. The Commission notes, however, that the common carrier microwave fixed licensee category includes some large entities.

124. Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these definitions. The FCC auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670–1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

125. 39 GHz Service. The Commission defines "small entity" for 39 GHz licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years. "Very small business" is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years. The SBA has approved these definitions. The auction of the 2,173 39 GHz licenses began on April 12, 2000, and closed on May 8, 2000.

The 18 bidders who claimed small business status won 849 licenses.

126. Local Multipoint Distribution Service. An auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined "small entity" for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years. An additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years. These regulations defining "small entity" in the context of LMDS auctions have been approved by the SBA. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winning bidders that won 119 licenses.

127. 218–219 MHz Service. The first auction of 218–219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs). Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years. In an order relating to the 218–219 MHz service, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding \$15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding \$3 million for the preceding three years. The SBA has approved of these definitions. At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218–219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we

assume for purposes of this IRFA that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

128. Location and Monitoring Service (LMS). Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$15 million. A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$3 million. These definitions have been approved by the SBA. An auction for LMS licenses commenced on February 23, 1999, and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses. We cannot accurately predict the number of remaining licenses that could be awarded to small entities in future LMS auctions.

129. Rural Radiotelephone Service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

130. Air-Ground Radiotelephone Service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and the Commission estimates that almost all of them qualify as small entities under the SBA definition.

131. Offshore Radiotelephone Service. This service operates on several ultra high frequency (UHF) TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons. The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition. The Commission

assumes, for purposes of this IRFA, that all of the 55 licensees are small entities, as that term is defined by the SBA.

132. Multiple Address Systems (MAS). Entities using MAS spectrum, in general, fall into two categories: (1) Those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, the Commission defines "small entity" for MAS licenses as an entity that has average gross revenues of less than \$15 million in the three previous calendar years. "Very small business" is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$3 million for the preceding three calendar years. The SBA has approved of these definitions. The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of January 20, 1999, there were a total of 8,670 MAS station authorizations. Of these, 260 authorizations were associated with common carrier service. In addition, an auction for 5,104 MAS licenses in 176 EAs began November 14, 2001, and closed on November 27, 2001. Seven winning bidders claimed status as small or very small businesses and won 611 licenses.

133. With respect to the second category, which consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definitions developed by the SBA would be more appropriate. The applicable definition of small entity in this instance appears to be the "Cellular and Other Wireless Telecommunications" definition under the SBA rules. This definition provides that a small entity is any entity employing no more than 1,500 persons. The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

134. Incumbent 24 GHz Licensees. The rules that we adopt could affect

incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The Commission did not develop a definition of small entities applicable to existing licensees in the 24 GHz band. Therefore, the applicable definition of small entity is the definition under the SBA rules for "Cellular and Other Wireless Telecommunications." This definition provides that a small entity is any entity employing no more than 1,500 persons. The 1992 Census of Transportation, Communications and Utilities, conducted by the Bureau of the Census, which is the most recent information available, shows that only 12 radiotelephone (now Wireless) firms out of a total of 1,178 such firms that operated during 1992 had 1,000 or more employees. This information notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

135. Future 24 GHz Licensees. With respect to new applicants in the 24 GHz band, we have defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding \$15 million. "Very small business" in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years. The SBA has approved these definitions. The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

136. 700 MHz Guard Band Licenses. In an order relating to the 700 MHz Guard Band, we adopted a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of 52 Major Economic Area

(MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

137. Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service. Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In connection with the 1996 MDS auction, the Commission defined "small business" as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years. The SBA has approved of this standard. The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 MDS licensees that are defined as small businesses under either the SBA's or the Commission's rules. Some of those 440 small business licensees may be affected by the proposals in the Further Notice.

138. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under \$10 million, and an additional 52 firms had receipts of \$10 million or more but less than \$25

million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies proposed in the Further Notice.

139. Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities. There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

140. The *NPRM* does not propose any specific reporting, recordkeeping or compliance requirements. However, we seek comment on what, if any, requirements we should impose if we adopt the proposals set forth in the *NPRM*.

Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

141. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

142. As stated earlier, we seek to minimize regulatory costs and eliminate unnecessary regulatory burdens to the deployment of spectrum-based services in rural areas. Therefore, we believe that modifying or eliminating certain rules should decrease the costs associated with regulatory compliance for licensees and increase flexibility in a manner that will facilitate access, capital formation, build-out and coverage in rural areas. We therefore anticipate that, although it seems likely that there will be a significant economic impact on a substantial number of small entities, there will be no adverse economic impact on small entities. In fact, certain of the proposed rules may particularly benefit small entities.

143. For example, the *NPRM* proposes that spectrum in rural areas that is leased by a licensee, and for which the lessee meets the performance requirements that are applicable to the licensee, should be construed as "used" for the purposes of this proceeding and any performance requirements we adopt. Although adoption of this proposal would benefit both small and large entities in the radio services where leasing is allowed, the majority of businesses in these radio services are small entities.

144. The *NPRM* further proposes a "substantial service" construction benchmark for all wireless services licensed on a geographic basis. We believe this proposal, if adopted, will affect small and large entities alike by providing increased flexibility, particularly in rural areas, for licensees to meet their performance requirements.

145. In addition, the *NPRM* proposes to modify the eligibility restrictions on the use of spectrum within the Basic Exchange Telephone Radio Systems (BETRS) to allow more flexible use of the spectrum. We believe this proposal, if adopted, will provide a particular benefit to small entities by providing current BETRS licensees, of which a majority are small entities, with increased flexibility to use BETRS spectrum.

146. In the *NPRM*, then, the Commission has set forth various options it is considering for each rule, from modifying them to eliminating them all together. We seek comment on any additional appropriate alternatives and especially alternatives that may further reduce economic impacts on small entities.

Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rules

147. None.

C. Initial Paperwork Reduction Act of 1995 Analysis

148. This *NPRM* seeks comment on a proposed information collection. As part of the Commission's continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *NPRM*, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due at the same time as other comments on this *NPRM* and must have a separate heading designating them as responses to the Initial Paperwork Reduction Analysis (IPRA). OMB comments are due 60 days from

date of publication of this *NPRM* in the **Federal Register**. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Judith B. Herman, Federal Communications Commission, room 1-C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to <Judith.B.Herman@fcc.gov> and to Kim A. Johnson, OMB Desk Officer, room 10236 NEOB, 725 17th Street, NW., Washington, DC 20503 via the Internet to Kim_A.Johnson@omb.eop.gov or by fax to 202-395-5167.

D. Comment Dates

149. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before December 29, 2003 and reply comments on or before January 26, 2004. Comments and reply comments should be filed in WT Docket No. 03-202. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, interested parties must file an original and four copies of all comments, reply comments, and supporting comments. If interested parties want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies.

150. Comments also may be filed using the Commission's Electronic Comment Filing System (ECFS). Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/cgb/ecfs>>. Generally, only one copy of an electronic submission must be filed. Commenters should transmit one electronic copy of the comments to WT Docket No. 03-202. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit electronic comments by Internet e-mail. To receive filing

instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

151. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location will be 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. In addition, parties who choose to file by paper should provide a courtesy copy of each filing to Nicole McGinnis, Attorney Advisor, Commercial Wireless Division, Wireless Telecommunications Bureau, 445 12th Street, SW., Room 6223, Washington, DC 20554 or by e-mail to Nicole McGinnis at Nicole.McGinnis@fcc.gov.

152. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

If you are sending this type of document or using this delivery method . . .	It should be addressed for delivery to . . .
Hand-delivered or messenger-delivered paper filings for the Commission's Secretary.	236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002 (8 to 7 p.m.)
Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service Express Mail and Priority Mail).	9300 East Hampton Drive, Capitol Heights, MD 20743 (8 a.m. to 5:30 p.m.)

If you are sending this type of document or using this delivery method . . .	It should be addressed for delivery to . . .
United States Postal Service first-class mail, Express Mail, and Priority Mail.	445 12th Street, SW., Washington, DC 20554

153. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., CY-B402, Washington, DC 20554 (see alternative addresses above for delivery by hand or messenger) (telephone 202-863-2893; facsimile 202-863-2898) or via e-mail at qualexint@aol.com.

154. The full text of this document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail qualexint@aol.com. Alternative formats (computer diskette, large print, audio cassette and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418-7426, TTY (202) 418-7365, or at brian.millin@fcc.gov.

IV. Ordering Clauses

155. Pursuant to the authority contained in sections 4(i), 11, 303(r), 309(j) and 706 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 157, 161, 303(r), and 309(j), the *NPRM* is adopted.

156. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of the *NPRM*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 22

Communications common carriers, rural areas.

47 CFR Part 24

Communications equipment, telecommunications.

47 CFR Part 90

Communications equipment, reporting and recordkeeping equipment.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Parts 22, 24, and 90 as follows:

PART 22—PUBLIC MOBILE SERVICES

1. The authority citation for Part 22 continues to read as follows:

Authority: 47 U.S.C. 154, 222, 303, 309 and 332.

2. Section 22.702 is revised to read as follows:

§ 22.702 Eligibility.

Existing and proposed communications common carriers are eligible to hold authorizations to operate conventional central office, interoffice and rural stations in the Rural Radiotelephone Service. Subscribers are also eligible to hold authorizations to operate rural subscriber stations in the Rural Radiotelephone Service.

PART 24—PERSONAL COMMUNICATIONS SERVICES

3. The authority citation for Part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309 and 332.

4. Section 24.203(a) is revised to read as follows:

§ 24.203 Construction requirements.

(a) Licensees of 30 MHz blocks must serve with a signal level sufficient to provide adequate service to at least one-third of the population in their licensed area within five years of being licensed and two-thirds of the population in their licensed area within ten years of being licensed. Alternatively, licensees may provide "substantial service" to their licensed area within ten years. Licensees may choose to define population using the 1990 census or the 2000 census. Failure by any licensee to meet these requirements will result in forfeiture or non-renewal of the license and the licensee will be ineligible to regain it.

* * * * *

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

5. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

6. Section 90.155(d) is revised to read as follows:

§ 90.155 Time in which station must be placed in operation.

* * * * *

(d) Multilateration LMS EA-licensees, authorized in accordance with § 90.353, must construct and place in operation a sufficient number of base stations that utilize multilateration technology (*see* paragraph (e) of this section) to provide multilateration location service to one-third of the EA's population within five years of initial license grant, and two-thirds of the population within ten years. Alternatively, licensees may provide "substantial service" to their licensed area within ten years. In demonstrating compliance with the construction and coverage requirements, the Commission will allow licensees to individually determine an appropriate field strength for reliable service, taking into account the technologies employed in their system design and other relevant technical factors. At the five and ten year benchmarks, licensees will be required to file a map and FCC Form 601 showing compliance with the coverage requirements (*see* § 1.946 of this chapter).

* * * * *

7. Section 90.685(b) is revised to read as follows:

§ 90.685 Authorization, construction and implementation of EA licenses.

* * * * *

(b) EA licensees in the 806–821/851–866 MHz band must, within three years of the grant of their initial license, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of its EA-based service area. Further, each EA licensee must provide coverage to at least two-thirds of the population of the EA-based service area within five years of the grant of their initial license. Alternatively, EA-based licensees may provide substantial service to their markets within five years of the grant of their initial license. Substantial service shall be defined as: "Service which is sound, favorable, and substantially above a level of mediocre service."

* * * * *

8. Section 90.767 is revised to read as follows:

§ 90.767 Construction and implementation of EA and Regional licenses.

(a) An EA or Regional licensee must construct a sufficient number of base stations (*i.e.*, base stations for land mobile and/or paging operations) to provide coverage to at least one-third of

the population of its EA or REAG within five years of the issuance of its initial license and at least two-thirds of the population of its EA or REAG within ten years of the issuance of its initial license. Alternatively, licensees may provide "substantial service" to their licensed area at their five- and ten-year benchmarks.

(b) Licensees must notify the Commission in accordance with § 1.946 of this chapter of compliance with the Construction requirements of paragraph (a) of this section.

(c) Failure by an EA or Regional licensee to meet the construction requirements of paragraph (a) of this section, as applicable, will result in automatic cancellation of its entire EA or Regional license. In such instances, EA or Regional licenses will not be converted to individual, site-by-site authorizations for already constructed stations.

(d) EA and Regional licensees will not be permitted to count the resale of the services of other providers in their EA or REAG, *e.g.*, incumbent, Phase I licensees, to meet the construction requirement of paragraph (a) or (b) of this section, as applicable.

(e) EA and Regional licensees will not be required to construct and place in operation, or commence service on, all of their authorized channels at all of their base stations or fixed stations.

9. Section 90.769 is revised to read as follows:

§ 90.769 Construction and implementation of Phase II nationwide licenses.

(a) A nationwide licensee must construct a sufficient number of base stations (*i.e.*, base stations for land mobile and/or paging operations) to provide coverage to a composite area of at least 750,000 square kilometers or 37.5 percent of the United States population within five years of the issuance of its initial license and a composite area of at least 1,500,000 square kilometers or 75 percent of the United States population within ten years of the issuance of its initial license. Alternatively, licensees may provide "substantial service" to their licensed area at their five- and ten-year benchmarks.

(b) Licensees must notify the Commission in accordance with § 1.946 of this chapter of compliance with the Construction requirements of paragraph (a) of this section.

(c) Failure by a nationwide licensee to meet the construction requirements of paragraph (a) of this section, as applicable, will result in automatic cancellation of its entire nationwide license. In such instances, nationwide

licenses will not be converted to individual, site-by-site authorizations for already constructed stations.

(d) Nationwide licensees will not be required to construct and place in operation, or commence service on, all of their authorized channels at all of their base stations or fixed stations.

[FR Doc. 03-28047 Filed 11-10-03; 8:45 am]

BILLING CODE 6712-01-U

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 393

[DOT Docket No. FMCSA-02-13589]

RIN 2126-AA80

Parts and Accessories Necessary for Safe Operation; Fuel Systems

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The FMCSA proposes to revise the requirements concerning fuel tank fill rates for gasoline- and methanol-fueled light-duty vehicles contained in Subpart E of the Federal Motor Carrier Safety Regulations (FMCSRs). The purpose of the proposal is to: (1) Remove a conflict between the fuel tank fill rate requirements of the FMCSRs and those of the Environmental Protection Agency for gasoline and methanol-fueled vehicles up to 14,000 pounds (lbs) Gross Vehicle Weight Rating (GVWR); and (2) to make permanent the terms of the exemptions previously granted to motor carriers operating certain gasoline-fueled commercial motor vehicles (CMVs) manufactured by Ford Motor Company (Ford) and by General Motors (GM). The FMCSA also proposes to incorporate into the FMCSRs previously issued regulatory guidance concerning the applicability of the agency's fuel tank rules to vehicles subject to the National Highway Traffic Safety Administration (NHTSA) fuel system integrity standard at the time of manufacture.

DATES: Comments must be received on or before January 12, 2004.

ADDRESSES: You may submit comments to DOT Docket Management Systems (DMS) Docket Number 13589 by any of the following methods:

- *Web site:* <http://dms.dot.gov>.

Follow the instructions for submitting comments on the DOT electronic docket site.

- *Fax:* 1-202-493-2251.

• *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-0001.

• *Hand Delivery:* Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal Holidays.

• *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation subheading at the beginning of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to <http://dms.dot.gov> including any personal information provided. Please see the Privacy Act heading under Regulatory Notices.

Docket: For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah M. Freund, Office of Bus and Truck Standards and Operations, (202) 366-4009, Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., Washington, DC 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Public Participation

The DMS is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help guidelines under the "help" section of the DMS web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Background

Section 393.67(c)(7)(ii) of Title 49, Code of Federal Regulations (CFR),

requires the fill pipe and vents of a CMV with a fuel tank of more than 25 gallons capacity to permit the tank to be filled at a rate of at least 20 gallons per minute (gpm) without fuel spillage.

In 1999, Ford and GM filed applications for limited exemptions from this fuel system requirement.

Ford manufactures a line of vehicles under the "Econoline" brand for additional work and sale by second-stage manufacturers, including use as CMVs as defined in 49 CFR 390.5. Specifically, finished vehicles are based on a "light-truck" platform with load-or passenger-carrying capabilities that place them within the weight-or passenger-carrying thresholds of the FMCSRs.

The fill pipe of the fuel system of these light-duty vehicles is routed to minimize its exposure in the event of a crash. Because of the design characteristics of the fuel fill-pipe and system and the vapor generated when filling such tanks with gasoline, Ford found that the fuel systems in the gasoline versions of these light-duty vehicles could not meet the FMCSA requirement of § 393.67(c)(7)(ii). However, Ford noted that the diesel versions complied with the 20 gallon per minute minimum filling rate. Ford applied for exemptions for the gasoline fueled light-duty vehicles from § 393.67(c)(7)(ii), and also 49 CFR 393.67(f)(2) and (f)(3), which require that liquid fuel tanks be marked with the manufacturer's name and display a certification label that the tank conforms to all applicable rules in § 393.67.

On August 10, 1999, the Federal Highway Administration (FHWA), now the FMCSA, published a Notice of Intent to grant Ford's application for exemption (64 FR 43417). The FHWA requested public comment on Ford's application and the agency's safety analysis and presented other relevant information. After considering all the comments received, the agency granted an exemption to Ford on December 20, 1999 (64 FR 71184). In that notice (at 71185), the agency noted that the 20 gallon per minute rate, while appropriate for diesel fuel-powered vehicles, mandates that fill pipes on gasoline-powered vehicles be capable of receiving fuel at twice the maximum rate gasoline pumps are allowed to dispense fuel.¹ The vehicles in question are gasoline-fueled and are capable of receiving fuel at a rate of 17 gallons per minute.

¹ As noted in our discussion below, the Environmental Protection Agency (EPA) standard is 10 gpm.

The FMCSA published a notice of intent on November 2, 2001 (66 FR 55727), to renew Ford's exemption and renewed the exemption on December 27, 2001 (66 FR 66970). Also on the same day, FMCSA published a Notice of Intent to extend the exemption to additional Ford vehicles of similar design (66 FR 66971). The agency granted that exemption on March 27, 2002 (67 FR 14765).

The chronology for the GM vehicles followed a similar pattern. The vehicles that were the subject of the petition were the G-vans (Chevrolet Express and GMC Savannah) and full size C/K trucks (Chevrolet Silverado and GMC Sierra). In a comment to the docket concerning the Ford petition, dated September 9, 1999, GM stated its support for the agency's preliminary determination and petitioned for the same exemption for its vehicles. On December 20, 1999, the FMCSA published a Notice of Intent to grant GM's application for exemption (64 FR 71186). The agency granted GM's petition on April 26, 2000 (65 FR 24531). The FMCSA published a notice of intent to renew the exemption on December 27, 2001 (66 FR 66972). It was renewed on March 27, 2002 (67 FR 14764).

In addition to the safety regulations published by the FMCSA and the NHTSA, vehicles and internal-combustion engines are subject to environmental protection regulations published by the EPA. In many cases, they are also subject to energy-efficiency regulations published by the Department of Energy (DOE). Occasionally, these regulations published by the EPA or the DOE can have an influence on the safety regulations, as in this case.

Related EPA Regulations

The EPA issued four final rules under Title 40 of the CFR relevant to the fuel-tank fill rate issue. Although the EPA rules address the reduction of emissions from vehicle fueling, they are relevant to the FMCSA safety regulations concerning fuel tank fill rates. This is because they place a number of refueling regulatory requirements on various parties. These include: Controls on the dispensing rate of gasoline and methanol from pumps, the rate at which gasoline and methanol fuels can be accepted into the tanks of certain vehicles, the ability of the vehicle fuel systems to safely handle vapors released during fueling, and the ability of the fuel systems to safely prevent any spitback of fuel during the fueling process.

The four EPA rules are: (1) A final rule concerning evaporative emissions

testing and fuel pump dispensing rates, issued March 24, 1993 (58 FR 16002), (2) a final rule concerning on-board refueling vapor recovery (ORVR) systems to control refueling emissions, published in the **Federal Register** on April 6, 1994 (59 FR 16262), (3) a final rule concerning Control of Emissions of Air Pollution From Highway Heavy-Duty Engines, published in the **Federal Register** on October 21, 1997 (62 FR 54693), and (4) a final rule for covering, among other things, on-board refueling vapor recovery (ORVR) systems for heavy-duty vehicles, issued October 6, 2000 (65 FR 59895).

The 1993 rule added § 80.22(j) to Title 40 setting a maximum dispensing rate of 10 gallons (37.9 liters (L)) per minute (/m) for most gasoline and methanol pumps, effective January 1, 1996. Certain facilities with low sales volume were given two additional years to comply. It also added new regulations which address, among other things, the standard for the fuel-dispensing spitback test for 1996 and later model year light-duty vehicles (0–6000 lbs GVWR) (§ 86.096–8), 1996 and later model year light-duty trucks (6,001–8,500 lbs GVWR) (§ 86.096–9), and 1996 and later model year Otto-cycle (standard four-cycle electronic ignition) heavy-duty vehicles (8,501–10,000 lbs GVWR) and engines (§ 86.096–10).

The 1994 rule sets forth additional requirements for controlling vehicle refueling emissions through the use of vehicle-based systems (that is, on-board vapor recovery (ORVR) systems). The requirements are to be phased in beginning with model year 1998 for light-duty vehicles, model year 2001 for light-duty trucks (0–6000 lbs GVWR), and model year 2004 for light-duty trucks (6,001–8,500 lbs GVWR). The 1994 rule carries forward the spitback standard published in 1993, although the EPA provides an alternative assessment procedure that is combined with the ORVR testing requirement.

Although the EPA had proposed that heavy-duty vehicles (8,501–10,000 lbs GVWR) be subject to the same on-board vapor recovery requirements as light-duty vehicles, it decided not to include them in the 1994 final rule. EPA noted that only a small number of heavy-duty vehicles are gasoline powered, and that its final rule would apply to 91 percent of all gasoline-fueled trucks. EPA's spitback and ORVR rules are not applicable to diesel fuels and diesel fueled vehicles because the Reid Vapor Pressure² of diesel fuel is very low (e.g.,

less than 1 pound per square inch (psi)) and, thus, spitback and refueling emissions are insignificant.

The EPA 1997 final rule adopted a new emissions standard and related provisions for diesel heavy-duty engines intended for highway operation. The standards affect emission levels and durability of emissions controls. They apply beginning with the 2004 model year.³

The EPA final rule concerning control of emissions from highway heavy-duty engines, published October 6, 2000 (65 FR 59896) adopted ORVR standards for model year 2005 and later heavy-duty vehicles (see 40 CFR 86.1816–05(e)). ORVR standards are applicable to all complete heavy-duty vehicles⁴ from 8,501 lbs GVWR to 10,000 lbs GVWR. The ORVR standards will be phased in with 80 percent compliance required in 2005 model year vehicles and 100 percent compliance required in 2006 model year and later vehicles.

However, as noted above, EPA requirements on evaporative emissions limit fuel-dispensing rates for gasoline and methanol pumps. The rates may not exceed 10 gpm (37.9 L/m). This action was taken to ensure that vehicles designed to prevent spitback during refueling at 10 gpm would not experience in-use fueling rates beyond the rate they were designed to accommodate. Also, a 10 gpm maximum fuel-dispensing rate is an inherent design parameter for vehicles designed to meet ORVR emission standards. ORVR vehicles that are refueled at dispensing rates above 10 gpm would likely exceed ORVR emissions standards because the vehicle's carbon canister is not designed to adsorb hydrocarbon vapors satisfactorily at these higher dispensing rates.

Retailers and wholesale purchasers-consumers handling over 10,000 gallons (37,854 L) of fuel per month were required to comply with the EPA final rule starting July 1, 1996. Other retailers and wholesale purchasers-consumers were required to comply by January 1, 1998. Any dispensing pump that is dedicated exclusively to heavy-duty

substance in the atmosphere above the solid or the liquid. (Source: <http://chemengineer.miningco.com:80/library/glossary/bldef9050.htm>)

³ The terms of the Consent Decree that accelerated the compliance date to October 1, 2002 affects engines in diesel-fueled CMVs that are not the subject of this NPRM.

⁴ The Clean Air Act defines heavy-duty vehicles as those with a GVWR of greater than 6,000 pounds. However, EPA has classified vehicles between 6,000 and 8,500 pounds GVWR as light-duty vehicles, while treating them as heavy-duty for statutory purposes. See 65 FR 59897 (October 6, 2000), at 59898.

² The pressure exerted by a vapor in equilibrium with the solid or liquid phase of the same substance. Also, the partial pressure of the

vehicles, boats, or airplanes is exempt from this requirement. EPA intends to make future rule changes to clarify that: (1) The 10 gpm refueling requirement also applies to ethanol pumps; and (2) the exemption does not apply to pumps used to refuel heavy-duty vehicles which meet ORVR emissions standards (that is, the exemption only applies to heavy-duty vehicles above 10,000 lbs GVWR).

Inconsistency Between FMCSA and EPA Fuel Tank Fill Rate Requirements

The changes in the EPA regulation created an inconsistency between the fuel tank fill rate requirements of FMCSA and those of the EPA. As discussed above, § 393.67(c)(7)(ii) of the FMCSRs requires a CMV fuel tank of 25 or more gallons capacity to accept fuel at a fill rate of at least 20 gpm. That is twice the maximum nozzle flow rate of 10 gpm for gasoline and methanol fuel pumps allowed by EPA regulations at 40 CFR 80.22(j). Ford and GM brought this inconsistency to the attention of the FMCSA as it applies to vehicles defined at 49 CFR 390.5, which are subject to the FMCSRs, and, by extension, State regulations compatible with Part 393. It is also twice the maximum fill fuel dispensing rate specified by the EPA at 40 CFR 80.22(j), and twice the fuel fill rate specified for the various fuel spitback tests at 40 CFR 86.1246–96.

The EPA regulations concerning gasoline dispensing rates have already been implemented, and pumps subject to the regulations (*i.e.*, all pumps except those dedicated to heavy-duty vehicles, boats, or planes) were required to comply with the 10 gpm (37.9 L/m) maximum dispensing rate requirements by January 1, 1998. Furthermore, depending upon the vehicle class, many of today's vehicles are already designed to meet ORVR and spitback emissions standards based on the EPA 10 gpm fuel fill rate requirements. Considering both of these issues, the 20-gallon per minute fill rate required under the FMCSRs is incompatible with the EPA regulations for those vehicles. It is possible that some of the gasoline- or methanol-fueled vehicles with GVWRs above 8,500 lbs GVWR might be fueled at facilities not subject to the EPA regulation on fuel dispensing rates. However, as noted in the agency's August 10, 1999 notice concerning the original Ford petition, Ford believed the 20-gpm rate:

“ * * * to be more a subject of convenience. With virtually all filling stations using the industry standard automatic shut-off nozzles, it is unlikely that fuel will be spilled even while using a high flow rate delivery system. These standard

nozzles substantially reduce any potential safety risk introduced by filling an Econoline vehicle at a rate above its capacity of 17 gallons per minute.”

Ford also noted that the 17-gpm rate is only 15 percent less than the FMCSA requirement at § 393.65 (64 FR 43417, at 43418).

The original applications for exemptions from Ford, and subsequently from GM, sought temporary solutions to the inconsistency between FMCSA safety regulations intended to prevent potential injuries from the spillage of fuel during the refueling process, and EPA regulations intended to protect against environmental harm resulting from fuel spillage and the release of fuel vapors into the atmosphere. This rulemaking is intended to provide a long-term resolution to the inconsistency between these safety and environmental regulations, while ensuring that the respective goals of FMCSA and EPA are not compromised.

As stated in the August 10, 1999 notice (at 43418), the gasoline-fueled Ford Econoline Series light-truck-platform vehicles in question were and continue (during the 2-year exemption) to be built with the fuel tanks mounted between the frame rails. They use a fuel pipe system routed to minimize exposure in the event of a crash. The maximum filling rate does not exceed 17 gpm. Thus, as far as those Ford vehicles for the exempted series were concerned, the agency subsequently determined the intent of the FMCSR safety requirement was satisfied because the fill rate was only slightly less than the FMCSR-mandated rate (December 20, 1999; 64 FR 71184, at 71185). That is, for those vehicles not fueled at facilities dispensing gasoline at the EPA-mandated limit of 10 gpm, *i.e.*, those vehicles that might be fueled at locations used exclusively for refueling heavy-duty vehicles, the agency determined that the level of safety would be equivalent to the level of safety that would be obtained by complying with § 393.67(c)(7)(ii).

As stated in the FMCSA December 20, 1999 notice (64 FR 71186, at 71187), the GM G and C/K vehicles were and continue to be equipped with fuel tanks mounted between the frame rails. They use a fill pipe system conforming to EPA requirements. Furthermore, for those vehicles with a GVWR of less than 14,000 lbs (6,400 kilograms (kg)), the EPA requires the vehicle to pass its Fuel Dispensing Spitback test (40 CFR § 86.099–10(b)(2)(C); §§ 86.1811 through 1815 paragraphs (d)(1)(iv) (in each case),

and § 86.1816–05(d)(4)).⁵ Thus again, for the duration of the 2-year exemption, FMCSA determined that safety concerns associated with different fill rates are addressed by the requirement that these vehicles must successfully comply with the spitback test.

In the original December 20, 1999 notice concerning the GM petition (at 71187), GM agreed with Ford that the 20 gallon per minute fill requirement is a matter of convenience. The GM vehicles that were the subject of its petition for a 2-year exemption were and continue to be equipped with fuel systems similar to those of the Ford vehicles, that is, with fuel tanks mounted between the frame rails, and designed to conform to FMVSS 301 requirements.

GM also suggested that the applicability of the FMCSA's fuel fill rate regulation should be restricted to vehicles equipped with side-mounted fuel tanks. GM contended that many of the FMCSR requirements were developed for heavy-duty vehicles, rather than the type of vehicles that were the subject of its petition. Many heavy-duty vehicles with side-mounted fuel tanks have fill openings directly on the fuel tank. Heavy-duty vehicles are also likely to be fueled at a location where the fuel fill rate exceeds 10 gallons per minute. (As noted earlier in this document, only pumps used exclusively to fuel heavy trucks, boats, and airplanes are exempt from the EPA's fuel dispensing rate requirement.)

The FMCSA agrees with the assessment that the current FMCSR 20 gpm minimum fuel tank fill-rate has become a customer convenience requirement rather than a safety requirement for all vehicles. FMCSA further believes the EPA design constraints the vehicles must comply with for emissions and fuel spitback testing adequately address any problems such vehicles could encounter during refueling.

Proposal Concerning Fuel Fill Rate Requirements

As discussed in the FHWA's August 10, 1999 Notice of Application from Ford Motor Company (64 FR 43417, at 43418), FMCSA believes the fill pipe capacity criterion, when applied to gasoline-powered vehicles, is inconsistent with EPA regulations

⁵ In a final rule concerning evaporative emissions test procedures (40 CFR 86, published March 24, 1993 [58 FR 16002]), EPA noted that heavy-duty vehicles over 14,000 lbs (6,400 kg) GVWR are typically designed with filler necks so short that fuel can be dispensed directly into the fuel tank. These vehicles would therefore not be expected to experience spitback. Therefore, they are exempt from the spitback test requirements (58 FR 16002, at 16006).

concerning gasoline fuel pumps. The FMCSR mandates that these vehicles be capable of receiving fuel at twice the maximum rate that these pumps are allowed to dispense fuel by EPA regulations. The FMCSA also continues to believe that a revision to the fuel fill rate requirements should not present a safety problem because the vehicles using the fill pipe and fueling system designs under consideration here are not likely to be fueled at locations where fuel could be dispensed at the higher rate.

The FMCSA believes that the other existing regulatory requirements, including a restricted fuel-pump dispensing rate, fuel fill rate for many (if not most) of these light-duty vehicles and light-duty trucks, plus required spitback and on-board refueling tests adequately address the safety of fueling these vehicles. (These requirements are discussed in detail under the above heading "Related EPA Regulations.") Therefore, the FMCSA proposes to require gasoline- and methanol-fueled vehicles with a GVWR of 8,500 pounds (3,744 kg) or less to comply with the applicable spitback and onboard refueling regulations of the Environmental Protection Agency under 40 CFR parts 86 and 88 (part 88 concerns clean-fuel vehicles). For gasoline- and methanol-fueled vehicles with a GVWR of 14,000 pounds (6,400 kg) or less, the FMCSA proposes to require that the vehicle comply with the applicable fuel-spitback prevention regulations and onboard refueling regulations of the Environmental Protection Agency under 40 CFR part 86.

Applicability of FMVSS 301 to Certain Additional CMVs

The FMCSA periodically codifies published regulatory guidance. Therefore, this NPRM also proposes to place in the FMCSRs previously published FMCSA regulatory guidance concerning the applicability of FMVSS 301 (Fuel System Integrity) to CMVs that have a GVWR of 10,000 lbs or less. In addition to the concern raised about the Ford and GM vehicles, there is another family of vehicles that fall under the definition of CMVs: Passenger vehicles designed or used to transport between 9 and 15 passengers (including the driver), in interstate commerce, and similar vehicles carrying placardable amounts of hazardous materials.

The existing Regulatory Guidance, published on April 4, 1997 (65 FR 16369, at 16417), reads as follows:

Question: Must a motor vehicle that meets the definition of a "commercial motor

vehicle" in § 390.5 because it transports hazardous materials in a quantity requiring placarding under the Hazardous Materials Regulations (49 CFR parts 171–180) comply with the fuel system requirements of Subpart E of Part 393, even though it has a gross vehicle weight rating (GVWR) of 10,000 pounds or less?

Guidance: No. FMVSS No. 301 contains fuel system integrity requirements for passenger cars and multipurpose passenger vehicles, trucks, and buses that have a GVWR of 10,000 pounds or less and use fuel with a boiling point above 0 deg. Celsius (32 deg. Fahrenheit). Subpart E of part 393 was issued to provide fuel system requirements to cover motor vehicles with a GVWR of 10,001 or more pounds. FMVSS No. 301 adequately addresses the fuel systems of placarded motor vehicles with a GVWR of less than 10,001 pounds and compliance with subpart E of part 393 would be redundant. However, commercial motor vehicles that are not covered by FMVSS No. 301 must continue to comply with subpart E of part 393.

Motor vehicles that meet the fuel system integrity requirements of NHTSA § 571.301 would be exempt from the requirements of FMCSA Subpart E of Part 393. The FMCSA proposes to include this provision under § 393.67 rather than § 393.65. Since the NHTSA standard deals with the overall integrity of liquid fuel systems, referencing it in the FMCSRs would take the place of a set of component-oriented standards for the class of smaller vehicles that are considered CMVs under the FMCSRs.

Rulemaking Analyses and Notices

Regulatory Notices

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.) You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit <http://dms.dot.gov>.

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FMCSA has determined that this proposed regulatory action is not significant within the meaning of Executive Order 12866 and under the regulatory policies and procedures of the DOT.

This proposed rule would revise the regulations concerning the fuel systems of certain light-duty vehicles used as CMVs. First, it would exclude from the fuel system integrity requirements of the FMCSRs certain light-duty vehicles that

are required to comply with the fuel system integrity requirements of FMVSS 301. Second, it would revise the requirements of section 393.67, Fill pipe, to bring them into conformity with EPA regulations. The FMCSA believes these changes would simplify motor carriers' ability to comply with the FMCSRs, and would not diminish the safe operation of these vehicles.

Based on the information presented here, FMCSA anticipates that this rulemaking will have minimal economic impact on the interstate motor carrier industry. Unless a motor carrier operates pumps that are used exclusively to fuel heavy-duty vehicles, motor carriers have been required to comply with the limitation on fueling rate since January 1, 1998.

Under provisions of The National Traffic and Motor Vehicle Safety Act ("Vehicle Safety Act") (49 U.S.C. 30101, *et seq.*, codified at 49 U.S.C. 30112) and NHTSA's implementing regulations, vehicles must be certified to meet all applicable FMVSSs at the time of their manufacture. Since the fuel systems of vehicles under 10,000 lbs GVWR are required to comply with FMVSS 301, there is no need for the FMCSA to require a separate fuel certification label on the fuel tanks of these vehicles.

This rulemaking imposes no requirements that would generate new costs for motor carriers. Those entities would see no change to their operations, provided they ensure that their CMVs with GVWRs of up to 10,000 pounds already comply with FMVSS 301, and their gasoline- and methanol-fueled CMVs comply with the applicable EPA regulations. This rulemaking is being proposed to harmonize the fuel system integrity requirements of FMCSA with those of the NHTSA and the EPA.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612) the FMCSA has evaluated the effects of this proposed rulemaking on small entities. Motor carriers would not be subject to any new requirements under this proposal. Generally, they would only have access to vehicles that comply with the FMVSSs and the EPA requirements. As a result, motor carriers may incur only minimal new costs, considerably less than the guideline of \$100 million or more in any one year.

Therefore, the FMCSA has preliminarily determined that this regulatory action would not have a significant economic impact on a substantial number of small entities. The FMCSA invites public comment on this determination.

Executive Order 12988 (Civil Justice Reform)

This proposed action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (April 23, 1997, 62 FR 19885), requires that agencies issuing "economically significant" rules that concern an environmental health or safety risk that an agency has reason to believe may disproportionately affect children must include an evaluation of the environmental health and safety effects of the regulation on children. Section 5 of Executive Order 13045 directs an agency to submit for a "covered regulatory action" an evaluation of its environmental health or safety effects on children.

The agency has determined that this proposed rule is not a "covered regulatory action" as defined under Executive Order 13045. First, this NPRM is not economically significant under Executive Order 12866. Second, the agency has no reason to believe that the proposed rule would result in an environmental health risk or safety risk that would disproportionately affect children. The vehicles that are the subject of this rulemaking are required to comply with both NHTSA and EPA standards concerning fuel system integrity and fuel tank fill rate. The agency has preliminarily determined that the proposed rule would have no significant environmental impacts.

Executive Order 12630 (Taking of Private Property)

This proposed rule would revise the FMCSRs concerning fuel system integrity and fuel tank fill rate, as they apply to gasoline-fueled CMVs, to bring them into conformance with current NHTSA and EPA regulations. It would also make permanent the exemptions previously granted at the request of Ford and GM.

No new action is required on the part of those motor carriers that currently operate or plan to operate on U.S. highways, because these vehicles are already required to comply with the NHTSA and EPA requirements referenced in this proposal. If the FMCSA issues a final rule, motor carriers operating vehicles on or after that rule's effective date, in compliance with the NHTSA and EPA requirements,

would not need to apply for an exemption.

The FMCSA therefore has preliminarily determined that this proposed rule has no taking implications under the Fifth Amendment or Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism)

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999. The FMCSA has preliminarily determined this proposed rule does not have a substantial direct effect on, or sufficient federalism implications for, the States, nor would it limit the policymaking discretion of the States.

These proposed changes to the FMCSRs would not directly preempt any State law or regulation. They would not impose additional costs or burdens on the States. Although the States are required to adopt part 393 as a condition for receiving Motor Carrier Safety Assistance Program grants, the additional training and orientation that would be required for roadside enforcement officials would be minimal, and it would be covered under the existing grant program. Also, this action would not have a significant effect on the States' ability to execute traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

This proposed action would not involve an information collection that is subject to the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520.

National Environmental Policy Act

The agency has analyzed this rulemaking for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has preliminarily determined in an environmental assessment (EA) that this proposed action would not have an adverse effect on the quality of the environment. A copy of the EA is contained in the public docket.

This notice of proposed rulemaking involves: (1) A revision of the FMCSRs'

CMV fuel fill rate requirements to align them with those of the EPA for gasoline and methanol-fueled vehicles up to 14,000 lbs GVWR; (2) making permanent the terms of the exemptions previously granted to motor carriers operating certain gasoline-fueled commercial motor vehicles manufactured by Ford and by GM; and (3) incorporating into the FMCSRs previously issued regulatory guidance concerning the applicability of the agency's fuel tank rules to vehicles subject to the NHTSA fuel system integrity standard at the time of manufacture.

The agency's proposed revision to the FMCSRs would not cause a change in the EPA's regulations, nor would it require a change in the design, operation, or fueling of these vehicles. It would simply acknowledge the existence of a different set of fuel fill-rate regulations for gasoline- and methanol-fueled vehicles, promulgated by the EPA to improve air quality by reducing vapor emissions from refueling, which were not considered at the time the fuel tank fill rate provision was added to the FMCSRs in 1952. The proposal would also make permanent the exemptions previously granted to motor carriers operating certain gasoline-fueled CMVs manufactured by Ford and GM which comply with the EPA regulations applicable to them. Finally, the proposal would also explicitly acknowledge these vehicles' compliance with FMVSS 301, thus eliminating redundancy with NHTSA regulations. The FMCSA has preliminarily determined that these proposals would have no significant impact on the environment. Thus, the proposed action does not require an environmental impact statement. FMCSA invites comments from the public to assess any potential environmental impacts associated with this proposal.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. We have preliminarily determined that it is not a "significant energy action" under that order because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It would revise the regulations concerning fuel system integrity and fuel tank fill rate, as they apply to gasoline-fueled CMVs, to bring them into conformance with current NHTSA and EPA regulations. It has no direct relation to energy consumption. The Administrator of the

Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Unfunded Mandates

This proposed rule would not impose a Federal mandate resulting in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (2 U.S.C. 1531 *et seq.*). The FMCSA merely seeks to implement a regulation that is inherently a design requirement for the vehicle and does not lend itself to roadside verification. Persons performing inspections at the roadside would likely receive orientation on this proposal (if it becomes a rule) as part of their regular in-service training. However, they would not be trained, equipped, or expected to check fuel tank fill rates at the roadside. Also, since the FMCSA is proposing to codify an existing exemption that had already been provided for light-duty CMVs with certain VINs, the agency anticipates that minimal, if any, additional training would be required. The inspectors would only need to refer to a reference card listing those grandfathered VINs. To the extent that States incur costs due to implementation of this proposal, they would be minimal and covered under the existing MCSAP grant program.

List of Subjects in 49 CFR Part 393

Highway and roads, Motor carriers, Motor vehicle equipment, Motor vehicle safety.

In consideration of the foregoing, the FMCSA proposes to amend title 49, CFR, subchapter B, chapter III, part 393 as follows:

PART 393—[AMENDED]

1. The authority citation for part 393 would continue to read as follows:

Authority: Sec. 1041(b) of Pub. L. 102-240, 105 Stat. 1914; 49 U.S.C. 31136 and 31502; and 49 CFR 1.73.

2. Section 393.67 is proposed to be amended by adding new paragraphs

(a)(7) and (f)(4), and revising paragraph (c)(7) to read as follows:

§ 393.67 Liquid Fuel Tanks.

(a) * * *

(7) Motor vehicles that meet the fuel system integrity requirements of 49 CFR 571.301 are exempt from the requirements of this subpart, as they apply to the vehicle's fueling system.

* * * * *

(c) * * *

(7) *Fill pipe.*

(i) Each fill pipe must be designed and constructed to minimize the risk of fuel spillage during fueling operations and when the vehicle is involved in a crash.

(ii) For diesel-fueled vehicles, the fill pipe and vents of a fuel tank having a capacity of more than 25 gallons (94.75 L) of fuel must permit filling the tank with fuel at a rate of at least 75.8 L/m (20 gallons per minute) without fuel spillage.

(iii) For gasoline- and methanol-fueled vehicles with a GVWR of 8,500 pounds (3,744 kg) or less, the vehicle must permit filling the tank with fuel dispensed at the applicable fill rate required by the regulations of the Environmental Protection Agency under 40 CFR 80.22.

(iv) For gasoline- and methanol-fueled vehicles with a GVWR of 14,000 pounds (6,400 kg) or less, the vehicle must comply with the applicable fuel-spitback prevention and onboard refueling vapor recovery (ORVR) regulations of the Environmental Protection Agency under 40 CFR part 86.

(v) Each fill pipe must be fitted with a cap that can be fastened securely over the opening in the fill pipe. Screw threads or a bayonet-type point are methods of conforming to the requirements of paragraph (c) of this section.

* * * * *

(f) * * *

(f)(4) *Exception.* The following previously exempted vehicles are *not* required to carry the certification and marking specified in Paragraphs (f)(1) through (3) of this section:

(i) First group of Ford E-Series vehicles identified as follows: The vehicle identification numbers (VINs) contain E30, E37, E39, E40, or E47 codes in the fifth, sixth, and seventh positions. The fuel tanks are marked with Ford part numbers F3UA-9002-G*, F3UA-9002-H*, F4UA-9002-V*, F4UA-9002-X*, F5UA-9002-V*, F5UA-9002-X*, F6UA-9002-Y*, F6UA-9002-Z*, F7UA-9002-C*, and F7UA-9002D* where the asterisk (*) represents a "wild card" character (any character of the alphabet).

(ii) Second group of Ford E-Series vehicles identified as follows: The VINs contain E35 or E55 codes in the fifth, sixth, and seventh positions. The fuel tanks are marked with Ford part numbers F3UA-9002-G*, F3UA-9002-H*, F4UA-9002-V*, F4UA-9002-X*, F5UA-9002-V*, F5UA-9002-X*, F6UA-9002-Y*, F6UA-9002-Z*, F7UA-9002-C*, F7UA-9002D*, YC25-9002-D* (a new fuel tank for E37 series vehicles), or 2C24-9002-E* (a new fuel tank for E55 series vehicles) where the asterisk (*) represents a "wild card" character (any character of the alphabet).

(iii) Ford F-Series vehicles identified as follows: The VINs contain an F53 code in the fifth, sixth, and seventh positions. The fuel tanks are marked with part numbers 1C34-9K007-F*, 1C34-9K007-G*, and 1C34-9K007-H* where the asterisk (*) represents a "wild card" character (any character of the alphabet).

(iv) GM G-Vans (Chevrolet Express and GMC Savanna) and full-sized C/K trucks (Chevrolet Silverado and GMC Sierra) with gross vehicle weight ratings over 10,000 pounds identified as follows: The VINs contain either a "J" or a "K" in the fourth position. In addition, the seventh position of the VINs on the G-Van would contain a "1."

* * * * *

Issued on: November 4, 2003.

Annette M. Sandberg,

Administrator.

[FR Doc. 03-28255 Filed 11-10-03; 8:45 am]

BILLING CODE 4910-EX-P

Notices

Federal Register

Vol. 68, No. 218

Wednesday, November 12, 2003

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

National Sheep Industry Improvement Center; Solicitation of Nominations of Board Members

AGENCY: National Sheep Industry Improvement Center, USDA.

ACTION: Notice: Invitation to submit nominations.

SUMMARY: The National Sheep Industry Improvement Center (NSIIC) announces that it is accepting nominations for the Board of Directors of the National Sheep Industry Improvement Center for two voting directors' positions whose terms expire on February 13, 2004. One position is for a member who have has expertise in lamb, wool, goat, or goat product marketing expertise and one position is for a member who is an active producer of sheep or goats. Board members manage and oversee the Center's activities. Nominations may only be submitted by National organizations that consist primarily of active sheep or goat producers in the United States and who have as their primary interest the production of sheep or goats in the United States. Nominating organizations should submit:

- (1) Substantiation that the nominating organization is national in scope,
- (2) The number and percent of members that are active sheep or goat producers,
- (3) Substantiation of the primary interests of the organization, and
- (4) An Advisory Committee Membership Background Information form (Form AD-755) for each nominee.

This action is taken in accordance with 7 U.S.C. 2008j(f), which establishes the powers and composition of the Board of Directors for the National Sheep Industry Improvement Center.

DATES: Completed nominations must be received no later than December 29, 2003. Nominations received after that date will not be considered.

ADDRESSES: Submit nominations and statements of qualifications to Jay B. Wilson, Executive Director/CEO, National Sheep Industry Improvement Center, USDA, PO Box 23483, Washington, DC 20026-3483, if using the U.S. Postal Service; or Room 2117, STOP 3250, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC 20250-3250, if using other carriers.

FOR FURTHER INFORMATION CONTACT: Jay B. Wilson, Executive Director/CEO, National Sheep Industry Improvement Center, USDA, PO Box 23483, Washington, DC 20026-3483, if using the U.S. Postal Service; or Room 2117, Stop 3250, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC 20250, if using other carriers. Telephone (202) 690-0632, (This is not a toll free number), FAX 202-720-1053. Forms and other information can be found at www.nsiic.org.

SUPPLEMENTARY INFORMATION: The NSIIC, or Sheep Center (Center), is authorized under 7 U.S.C. 2008j. The Center shall: (1) Promote strategic development activities and collaborative efforts by private and State entities to maximize the impact of Federal assistance to strengthen and enhance production and marketing of sheep or goat products in the United States; (2) optimize the use of available human capital and resources within the sheep or goat industries; (3) provide assistance to meet the needs of the sheep or goat industry for infrastructure development, business development, production, resource development, and market and environmental research; (4) advance activities that empower and build the capacity of the United States sheep or goat industry to design unique responses to special needs of the sheep or goat industries on both a regional and national basis; and (5) adopt flexible and innovative approaches to solving the long-term needs of the United States sheep or goat industry.

The management of NSIIC is vested in a Board of Directors that is appointed by, and reports to the Secretary of Agriculture. The Board of Directors is composed of seven voting members of whom four are active producers of sheep or goats in the United States, two have expertise in finance and management, and one has expertise in lamb, wool, goat or goat product

marketing. Of the two open positions, one position is for a member with expertise in lamb, wool, goat, or goat product marketing and one position is for a member who is an active producer of sheep or goats. The Board also includes two non-voting members, the Under Secretary of Agriculture for Rural Development and the Under Secretary of Agriculture for Research, Education, and Economics. The Executive Director serves as the CEO.

The Secretary of Agriculture shall appoint the voting members from the submitted nominations. Member's term of office shall be three years. Voting members are limited to two terms. Each of the two positions for which nominees are being sought is currently held by members who are eligible to be re-nominated.

The Board shall meet not less than once each fiscal year, but is likely to meet at least quarterly. Board members will not receive compensation for serving on the Board of Directors, but shall be reimbursed for travel, subsistence, and other necessary expenses.

The statement of qualifications of the individual nominees is obtained by using Form AD-755, "Advisory Committee Membership Background Information," which can be accessed at www.nsiic.org. The requirements of this form are incorporated under OMB number 0505-0001.

Dated: November 4, 2003.

Jay B. Wilson,

Executive Director/CEO, National Sheep Industry Improvement Center.

[FR Doc. 03-28345 Filed 11-10-03; 8:45 am]

BILLING CODE 1351-01-P

DEPARTMENT OF AGRICULTURE

Office of the Secretary

USDA Technology and eGovernment Advisory Council

AGENCY: Office of the Secretary, USDA.

ACTION: Notice of intent; establishment of Advisory Council.

SUMMARY: The Department of Agriculture is proposing to establish the USDA Technology and eGovernment Advisory Council to seek input from a broad base of USDA customers, partners, and employees into the

Department's planning and implementation of technology solutions.

FOR FURTHER INFORMATION CONTACT: Scott Charbo, Chief Information Officer, USDA, 1400 Independence Ave., SW., Room 414W, Washington DC, 20250, telephone 202/720-8833.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (5 U.S.C.App), notice is hereby given that the U.S. Department of Agriculture proposes to establish the USDA Technology and eGovernment Advisory Council to seek input from a broad base of USDA customers, partners, and employees into the Department's planning and implementation of technology solutions. The Council will provide advice and recommendations on improving USDA technology and eGovernment planning and operations.

The Council consists of nine members, all of which attend quarterly council meetings. Every effort is made to select council members who are outstanding in their respective professions and are knowledgeable of the various mission areas of USDA, and on how technology, both USDA and customer-owned, can be used to improve productivity and services.

A meeting notice will be published in the **Federal Register** within 15 to 45 days before a scheduled meeting date. All meetings are generally open to the public and may include a "public forum" that may offer 5-10 minutes for participants to present comments to the advisory committee. Alternates may choose not to be active during this session on the agenda. The chair of the given committee ultimately makes the decision whether to offer time on the agenda for the public to speak to the general body.

Equal opportunity practices will be followed in all appointments to the advisory committee. To ensure that the recommendations of the Advisory Council have taken into account the needs of diverse groups served by the Departments, membership will, to the extent practicable, include individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

USDA will begin accepting nominations to the Council on November 15, 2003. Persons interested in serving on the Advisory Council, or in nominating individuals to serve, can access the Nomination Form AD-755 on USDA's Web site at: <http://www.ocio.usda.gov>. The Nomination Form may also be obtained by contacting the USDA Office of the Chief Information Officer (OCIO) by telephone

(202) 720-8833, fax (202) 720-1031, or e-mail (adrienne.bowman@usda.gov).

Completed nomination forms must be submitted to OCIO by fax or in hard copy to: Office of the Chief Information Officer, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Room 414-W, Washington, DC 20250. Form AD-755 must be received not later than January 15, 2004.

Dated: November 4, 2003.

Scott Charbo,

Chief Information Officer.

[FR Doc. 03-28291 Filed 11-10-03; 8:45 am]

BILLING CODE 3410-11-P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Meeting

AGENCY: Notice of Resource Advisory Committee, Sundance, Wyoming, USDA, Forest Service.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92-463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106-393), the Black Hills National Forests' Crook County Resource Advisory Committee will meet Monday, November 17, 2003 in Sundance, Wyoming for a business meeting. The meeting is open to the public.

SUPPLEMENTARY INFORMATION: The business meeting on October 20, begins at 6:30 p.m. at the U.S. Forest Service, Bearlodge Ranger District office, 121 South 21st Street, Sundance, Wyoming. Agenda topics will include: New project proposals for fiscal year 2004, updates on previously funded projects. A public forum will begin at 8:30 p.m. (MT).

FOR FURTHER INFORMATION CONTACT:

Steve Kozel, Bearlodge District Ranger and Designated Federal Officer, at (307) 283-1361.

Dated: November 5, 2003.

Steve Kozel,

Bearlodge District Ranger.

[FR Doc. 03-28289 Filed 11-10-03; 8:45 am]

BILLING CODE 3410-11-M

DEPARTMENT OF COMMERCE

International Trade Administration

[A-351-832, A-122-840, A-560-815, A-201-830, A-841-805, A-274-804, A823-812, C-351-833, and C-122-841]

Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Final Results of Changed Circumstances Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Result of Changed Circumstances Review of the Antidumping Duty and Countervailing Duty Orders, and Intent To Revoke Orders in Part.

EFFECTIVE DATE: November 12, 2003.

SUMMARY: On August 21, 2003, the Department of Commerce (the Department) published a notice of initiation of a changed circumstances review with the intent to revoke, in part, the antidumping duty orders and countervailing duty orders on carbon and certain alloy steel wire rod, as described below. *See Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Initiation of Changed Circumstances Antidumping Duty Administrative Review and Countervailing Duty Administrative Reviews, and Intent To Revoke Orders in Part*, 68 Fed. Reg. 50,513 (August 21, 2003) (*Initiation Notice*).

On October 6, 2003, the Department published the preliminary results of the changed circumstances review and preliminarily determined to revoke this order, in part, with respect to products entered, or withdrawn from warehouse, for consumption on or after July 24, 2003 of carbon and certain alloy steel wire rod described below, because domestic parties have expressed no interest in the continuation of the orders on that merchandise. *See Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Notice of Preliminary Results of Changed Circumstances Review of the Antidumping Duty and Countervailing Duty Orders, and Intent To Revoke Orders in Part*, 68 Fed. Reg. 57,664 (October 6, 2003) (*Preliminary Results*). After opportunity for comment, petitioners commented to correct the effective date language of this changed circumstances review. Since we did not receive any other comments objecting to the partial revocation of this changed

circumstances review, we conclude that substantially all domestic producers lack interest in the relief provided by this order. Therefore, in our final results of the changed circumstances review, the Department hereby revokes this order with respect to products entered, or withdrawn from warehouse, for consumption on or after July 24, 2003 of carbon and certain alloy steel wire rod, as described below.

FOR FURTHER INFORMATION CONTACT:

Brian J. Sheba or Robert M. James, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482-0145 or (202) 482-0649.

SUPPLEMENTARY INFORMATION:

Background

The Department published the antidumping duty orders on steel wire rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine on October 29, 2002. *See Notice of Antidumping Duty Orders: Carbon and Certain Alloy Steel Wire Rod From Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, 67 Fed. Reg. 65,945, and *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Carbon and Alloy Steel Wire Rod From Canada*, 67 Fed. Reg. 65,944. The Department published the countervailing duty orders on steel wire rod from Brazil and Canada on October 22, 2002. *See Notice of Countervailing Duty Orders: Carbon and Certain Alloy Steel Wire Rod From Brazil and Canada*, 67 Fed. Reg. 64,871. On July 24, 2003, petitioners requested that the Department change the technical description of certain grade 1080 tire cord quality wire rod and grade 1080 tire bead quality wire rod (hereafter, tire cord wire rod). This request arises, petitioners aver, because the original definition of the excluded tire cord wire rod was drawn too narrowly and, thus, captures within the scope certain products petitioners no longer wish to have subject to the orders.

On August 21, 2003, the Department published a notice of initiation of a changed circumstances review of the antidumping duty and countervailing duty orders on carbon and certain alloy steel wire rod products. *See Initiation Notice*. In the *Initiation Notice*, we indicated interested parties could submit comments for consideration in the Department's preliminary results not later than 14 days after publication of the initiation of the review, and submit

responses to those comments no later than 5 days following the submission of comments. On August 22, 2003, petitioners filed comments that stated the *Initiation Notice* contains an error in language with respect to the effective date of liquidation of entries because the *Initiation Notice* does not match the intent of petitioners.

The *Initiation Notice* stated:

If, as a result of this review, we revoke the order, in part, we intend to instruct the Bureau of Customs and Border Protection (Customs) to liquidate without regard to antidumping duties, as applicable, and to refund any estimated antidumping duties collected for all unliquidated entries of the tire cord wire rod products meeting the specifications indicated above, as of July 24, 2003, the date this changed circumstances review request was filed by Petitioners, in accordance with 19 CFR 351.222(g)(4).

Initiation Notice, 68 Fed. Reg. 50,513, at 50,515. Petitioners claim this language could be read to mean that all unliquidated entries existing as of July 24, 2003 will be subject to the terms of the changed scope. The phrase "as of July 24, 2003" could also be read to mean that entries made prior to July 24, 2003 that were subject to the original scope would now be excluded by the new scope exclusion language. Petitioners state such a result is contrary to the plain language of petitioners' request and not the intent of the Department's *Initiation Notice*. Petitioners did not otherwise comment on the scope of the orders. No other interested party commented on the *Initiation Notice*.

On October 6, 2003, the Department took account of the petitioners' comments and published the preliminary results of the changed circumstances review. *See Preliminary Results*. In the *Preliminary Results*, we again afforded interested parties an opportunity to submit comments for consideration in the Department's final results. We did not receive any comments following the *Preliminary Results*.

Scope of the Orders

The merchandise covered by these orders is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter.

Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (HTSUS) definitions for

(a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; and (e) concrete reinforcing bars and rods. Also excluded are (f) free machining steel products (*i.e.*, products that contain by weight one or more of the following elements: 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium).

Also excluded from the scope are 1080 grade tire cord quality wire rod and 1080 grade tire bead quality wire rod. This grade 1080 tire cord quality rod is defined as: (i) grade 1080 tire cord quality wire rod measuring 5.0 mm or more but not more than 6.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no inclusions greater than 20 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04-114; (v) having a surface quality with no surface defects of a length greater than 0.15 mm; (vi) capable of being drawn to a diameter of 0.30 mm or less with 3 or fewer breaks per ton, and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.006 percent or less of nitrogen, and (5) not more than 0.15 percent, in the aggregate, of copper, nickel and chromium.

This grade 1080 tire bead quality rod is defined as: (i) grade 1080 tire bead quality wire rod measuring 5.5 mm or more but not more than 7.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no inclusions greater than 20 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04-114; (v) having a surface quality with no surface defects of a length greater than 0.2 mm; (vi) capable of being drawn to a diameter of 0.78 mm or larger with 0.5 or fewer breaks per ton; and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of soluble aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.008 percent or less of nitrogen, and (5) either not more than 0.15 percent, in the aggregate, of copper, nickel and chromium (if chromium is not specified), or not more than 0.10 percent

in the aggregate of copper and nickel and a chromium content of 0.24 to 0.30 percent (if chromium is specified).

The designation of the products as "tire cord quality" or "tire bead quality" indicates the acceptability of the product for use in the production of tire cord, tire bead, or wire for use in other rubber reinforcement applications such as hose wire. These quality designations are presumed to indicate that these products are being used in tire cord, tire bead, and other rubber reinforcement applications, and such merchandise intended for the tire cord, tire bead, or other rubber reinforcement applications is not included in the scope. However, should petitioners or other interested parties provide a reasonable basis to believe or suspect that there exists a pattern of importation of such products for other than those applications, end-use certification for the importation of such products may be required. Under such circumstances, only the importers of record would normally be required to certify the end use of the imported merchandise.

All products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope.

The products under investigation are currently classifiable under subheadings 7213.91.3010, 7213.91.3090, 7213.91.4510, 7213.91.4590, 7213.91.6010, 7213.91.6090, 7213.99.0031, 7213.99.0038, 7213.99.0090, 7227.20.0010, 7227.20.0020, 7227.20.0090, 7227.20.0095, 7227.90.6051, 7227.90.6053, 7227.90.6058, and 7227.90.6059 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this proceeding is dispositive.

Scope of Changed Circumstances Review

The products subject to this changed circumstances antidumping duty and countervailing duty administrative review are certain grade 1080 tire cord steel wire rod and grade 1080 tire bead steel wire rod. Point (iii) of the existing definition of these products reads: "having no inclusions greater than 20 microns." Petitioners suggest amending this to read "having no *non-deformable* inclusions greater than 20 microns and *no deformable inclusions greater than 35 microns*." Letter from petitioners dated July 24, 2003, at 5 (emphases in original).

Petitioners would then insert an explanatory paragraph after the existing definition of tire cord wire rod reading:

For purposes of the grade 1080 tire

cord quality wire rod and the grade 1080 tire bead quality wire rod, an inclusion will be considered to be deformable if its ratio of length (measured along the axis - that is, the direction of rolling - of the rod) over thickness (measured on the same inclusion in a direction perpendicular to the axis of the rod) is equal to or greater than three. The size of an inclusion for purposes of the 20 microns and 35 microns limitations is the measurement of the largest dimension observed on a longitudinal section measured in a direction perpendicular to the axis of the rod.

Letter from petitioners dated August 6, 2003, at 6; original emphasis deleted.

Final Results of Review and Intent to Revoke in Part the Antidumping Duty and Countervailing Duty Orders

Pursuant to sections 751(d)(1) of the Tariff Act, the Department may revoke an antidumping or countervailing duty order, in whole or in part, based on a review under section 751(b) of the Tariff Act (*i.e.*, a changed circumstances review). Section 751(b)(1) of the Tariff Act requires a changed circumstances review to be conducted upon receipt of a request which shows changed circumstances sufficient to warrant a review. Section 782(h)(1) of the Tariff Act gives the Department the authority to revoke an order if producers accounting for substantially all of the production of the domestic like product have expressed a lack of interest in the continuation of the order. Section 351.222(g) of the Department's regulations provides that the Department will conduct a changed circumstances administrative review under 19 CFR 351.216, and may revoke an order (in whole or in part), if it concludes that (i) producers accounting for substantially all of the production of the domestic like product to which the order pertains have expressed a lack of interest in the relief provided by the order, in whole or in part, or (ii) if other changed circumstances sufficient to warrant revocation exist.

Since the Department did not receive any comments during the comment period opposing the exclusion of certain grade 1080 tire cord quality wire rod and grade 1080 tire bead quality wire rod, as defined in the "Scope of Changed Circumstances Review" above, from the antidumping duty and countervailing duty orders, we conclude that producers accounting for substantially all of the production of the domestic like product to which these orders pertain lack interest in the relief provided by the order. For these

reasons, the Department is revoking the orders on carbon and certain alloy steel wire rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine, in part, for all entries after the date of the petitioners' request with regard to the products which meet the specifications above in accordance with sections 751(b) and (d) and 782(h) of the Tariff Act and 19 CFR 351.216. We will instruct U.S. Customs and Border Protection to liquidate all entries of subject products entered, or withdrawn from warehouse, for consumption on or after July 24, 2003, the effective date of the revocation, in part, of these orders, in accordance with 19 CFR 351.222(g)(4).

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.306. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 751(b)(1) and 777(i)(1) of the Tariff Act and 19 CFR 351.216 and 351.222 of the Department's regulations.

Dated: November 5, 2003.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 03-28338 Filed 11-10-03; 8:45 am]

BILLING CODE 3510-DS-S

DEPARTMENT OF COMMERCE

International Trade Administration

[A-791-819]

Notice of Initiation of Antidumping Duty Investigation: Certain Aluminum Plate From South Africa

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Initiation of Antidumping Duty Investigation.

EFFECTIVE DATE: November 12, 2003.

FOR FURTHER INFORMATION CONTACT: Kate Johnson at (202) 482-4929 or Rebecca Trainor at (202) 482-4007, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Initiation of Investigation

The Petition

On October 16, 2003, the Department of Commerce (the Department) received a petition filed in proper form by Alcoa Inc. (the petitioner). The Department received supplements to the petition on October 29, and November 3, 2003.

In accordance with section 732(b)(1) of the Tariff Act of 1930 (the Act), as amended, the petitioner alleges that imports of certain aluminum plate from South Africa are being, or are likely to be, sold in the United States at less-than-fair-value (LTFV) within the meaning of section 731 of the Act, and that imports from South Africa are materially injuring, or are threatening to materially injure, an industry in the United States.

The Department finds that the petitioner filed this petition on behalf of the domestic industry because it is an interested party as defined in section 771(9)(C) of the Act and it has demonstrated sufficient industry support with respect to the antidumping investigation that it is requesting the Department to initiate. *See infra*, "Determination of Industry Support for the Petition."

Scope of Investigation

The merchandise covered by this investigation is 6000 series aluminum alloy, flat surface, rolled plate, whether in coils or cut-to-length forms, that is rectangular in cross section with or without rounded corners and with a thickness of more than 6.3 millimeters. 6000 Series Aluminum Rolled Plate is defined by the Aluminum Association, Inc.

Excluded from the scope of this investigation are extruded aluminum products and tread plate.

The merchandise subject to this investigation is classifiable under subheading 7606.12.3030 of the Harmonized Tariff Schedule of the United States (HTS). Although the HTS subheadings are provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

As discussed in the preamble to the Department's regulations (*Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997)), we are setting aside a period for parties to raise issues regarding product coverage. The Department encourages all parties to submit such comments within 20 calendar days of publication of this notice. Comments should be addressed to Import Administration's Central Records Unit, Room 1870, U.S. Department of Commerce, 14th Street

and Constitution Avenue, NW., Washington, DC 20230. The period of scope consultations is intended to provide the Department with ample opportunity to consider all comments and consult with parties prior to the issuance of the preliminary determination.

Period of Investigation

The anticipated period of investigation is October 1, 2002, through September 30, 2003.

Determination of Industry Support for the Petition

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that the Department's industry support determination, which is to be made before the initiation of the investigation, be based on whether a minimum percentage of the relevant industry supports the petition. A petition meets this requirement if the domestic producers or workers who support the petition account for: (1) At least 25 percent of the total production of the domestic like product; and (2) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) Poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A), or (ii) determine industry support using a statistically valid sampling method.

Section 771(4)(A) of the Act defines the "industry" as the producers of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The International Trade Commission ("ITC"), which is responsible for determining whether "the domestic industry" has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product (section 771(10) of the Act), they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's

determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to the law.¹

Section 771(10) of the Act defines the domestic like product as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title." Thus, the reference point from which the domestic like product analysis begins is "the article subject to an investigation," *i.e.*, the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition.

With regard to the definition of domestic like product, the petitioner does not offer a definition of domestic like product distinct from the scope of the investigation. Based on our analysis of the information presented by the petitioner, we have determined that there is a single domestic like product, aluminum plate, which is defined in the "Scope of Investigation" section above, and we have analyzed industry support in terms of this domestic like product.

The petition identifies additional U.S. companies engaged in the production of aluminum plate. In the October 29, 2003, supplemental petition submission, one of these companies, Kaiser Aluminum and Chemical Corporation, provides a letter indicating its support of the petition. In addition, the petitioner's November 3, 2003 supplemental petition submission contains a letter in support of the petition from the United Steelworkers of America, which claims to represent virtually all the workers engaged in the production of the domestic like product.

Our review of the data provided in the petition indicates that the petitioner has established industry support representing over 50 percent of total production of the domestic like product, requiring no further action by the Department pursuant to section 732(c)(4)(D) of the Act. In addition, the Department received no opposition to the petition from the remaining domestic producer of the like product. Therefore, the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and the requirements of section 732(c)(4)(A)(i) of the Act are met.

¹ See *USEC, Inc. v. United States*, 132 F. Supp. 2d 1, 8 (Ct. Int'l Trade 2001), citing *Algoma Steel Corp. Ltd. v. United States*, 688 F. Supp. 639, 642-44 (Ct. Int'l Trade 1988) ("the ITC does not look behind ITA's determination, but accepts ITA's determination as to which merchandise is in the class of merchandise sold at LTFV").

Furthermore, the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition. Thus, the requirements of section 732(c)(4)(A)(ii) of the Act also are met. Accordingly, the Department determines that the petition was filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act. *See also* Import Administration AD/CVD Enforcement Initiation Checklist ("Initiation Checklist"), Industry Support section, dated November 5, 2003, on file in the Central Records Unit of the main Department of Commerce building.

Export Price and Normal Value

The following is a description of the allegation of sales at LTFV upon which the Department based its decision to initiate this investigation. The sources of data for the deductions and adjustments relating to U.S. price and normal value (NV) are discussed in greater detail in the Initiation Checklist. Should the need arise to use any of this information as facts available under section 776 of the Act in our preliminary or final determination, we may re-examine the information and revise the margin calculations, if appropriate.

Export Price

The petitioner alleged that the subject aluminum plate produced in South Africa by Hulett Aluminum (Pty) Limited (Hulett) (*i.e.*, the only company that has exported subject merchandise to the United States from South Africa during the most recent twelve months) was sold to Empire Resources, Inc., an unaffiliated U.S. trading company, prior to importation of the merchandise into the United States. Therefore, the petitioner based U.S. price on export price (EP). The petitioner based EP prices for aluminum plate on a price quote for Alloy 6061 T651 aluminum plate adjusted for inland freight charges from Hulett's plant in Pietermaritzburg, South Africa to the port of Durban, international freight expenses from Durban, South Africa to U.S. East Coast ports, as well as a U.S. importer/distributor markup and a U.S. reseller markup.

Normal Value

The petitioner based NV on two price quotes for Alloy 6082 T6 from a South African distributor of aluminum products. The petitioner alleged that, while Hulett does not sell identical grades of merchandise to the United

States and home markets, grade Alloy 6082 T6, sold to the home market, and grade Alloy 6061 T651, sold to the United States, are functionally equivalent, have minimal differences in chemistry, and have no meaningful differences in production costs. The petitioner adjusted the NV for movement charges in the home market and differences in direct selling expenses (imputed credit) between the United States and the home market. The petitioner did not adjust NV for packing expenses because it is the petitioner's understanding that the packing form and materials are the same in both markets.

The estimated dumping margins in the petition based on a comparison between EP and NV range from 80.19 percent to 106.77 percent.

Fair Value Comparisons

Based on the data provided by the petitioner, there is reason to believe that imports of certain aluminum plate from South Africa are being, or are likely to be, sold at LTFV.

Allegations and Evidence of Material Injury and Causation

The petitioner alleges that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of imports from South Africa of the subject merchandise sold at less than NV.

The petitioner contends that the industry's injured condition is evident in the sales volume and market share lost to unfair imports, as well as rapidly declining and depressed U.S. prices. The allegations of injury and causation are supported by relevant evidence including U.S. import data, lost sales, and pricing information. We have assessed the allegations and supporting evidence regarding material injury and causation, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation. *See* the Initiation Checklist.

Initiation of Antidumping Investigation

Based upon our examination of the petition on certain aluminum plate from South Africa, we have found that it meets the requirements of section 732 of the Act. Therefore, we are initiating an antidumping duty investigation to determine whether imports of certain aluminum plate from South Africa are being, or are likely to be, sold in the United States at LTFV. Unless this deadline is extended pursuant to section 733(b)(1)(A) of the Act, we will make our preliminary determination no later

than 140 days after the date of this initiation.

Distribution of Copies of the Petition

In accordance with section 732(b)(3)(A) of the Act, a copy of the public version of the petition has been provided to the representatives of the Government of South Africa. We will attempt to provide a copy of the public version of the petition to each exporter named in the petition, as provided for under 19 CFR 351.203(c)(2).

ITC Notification

We have notified the ITC of our initiation as required by section 732(d) of the Act.

Preliminary Determination by the ITC

The ITC will preliminarily determine no later than December 1, 2003, whether there is a reasonable indication that imports of certain aluminum plate from South Africa are causing material injury, or threatening to cause material injury, to a U.S. industry. A negative ITC determination will result in the investigation being terminated, otherwise, this investigation will proceed according to statutory and regulatory time limits.

This notice is issued and published pursuant to section 777(i) of the Act.

Dated: November 5, 2003.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 03-28340 Filed 11-10-03; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-475-703]

Granular Polytetrafluoroethylene Resin From Italy: Notice of Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of rescission of antidumping duty administrative review.

EFFECTIVE DATE: November 12, 2003.

SUMMARY: On September 30, 2003, the Department of Commerce (the Department) published in the **Federal Register** (68 FR 56262) a notice announcing the initiation of an administrative review of the antidumping duty order on granular polytetrafluoroethylene resin from Italy, covering the period August 1, 2002,

through July 31, 2003. The review was requested by Solvay Solexis, Inc. and Solexis America Inc. (collectively Solvay), an Italian producer of the subject merchandise under review and its United States subsidiary. We are now rescinding this review as a result of Solvay's withdrawal of its request for an administrative review.

FOR FURTHER INFORMATION CONTACT:

Keith Nickerson or Carol Henninger, at (202) 482-3813 or (202) 482-3003, respectively, AD/CVD Enforcement Office 5, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

In accordance with 19 CFR 351.213(b), on August 29, 2003, Solvay requested an administrative review of the antidumping duty order on granular polytetrafluoroethylene resin from Italy. On September 30, 2003, in accordance with 19 CFR 351.221(c)(1)(i), we initiated an administrative review of this order for the period August 1, 2002, through July 31, 2003 (68 FR 56262). Solvay withdrew its request for this review on October 24, 2003. *See Letter from Maureen Rosch, representative of Solvay, to the Department* (October 24, 2003).

Rescission of Review

The Department's regulations at 19 CFR 351.213(d)(1) provide that the Department will rescind an administrative review if the party that requested the review withdraws its request for review within 90 days of the date of publication of the notice of initiation of the requested review, or withdraws its request at a later date if the Department determines that it is reasonable to extend the time limit for withdrawing the request. Solvay withdrew its request within the 90-day period. Accordingly, we are rescinding this review. The Department will issue appropriate assessment instructions to the U.S. Customs and Border Protection within 15 days of publication of this notice.

This notice serves as a reminder to parties subject to administrative protective order ("APO") of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply

with the regulations and terms of an APO is a sanctionable violation.

This notice is issued and published in accordance with 19 CFR 351.213(d)(4) and section 777(i)(1) of the Tariff Act of 1930, as amended.

Dated: November 5, 2003.

Holly A. Kuga,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 03-28339 Filed 11-10-03; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-580-841]

Structural Steel Beams From the Republic of Korea: Extension of Final Results of the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of postponement for the final determination of the antidumping duty administrative review.

SUMMARY: The Department of Commerce ("the Department") is extending the time limit for the final results of the antidumping duty administrative review of structural steel beams ("SSB") from the Republic Korea.

EFFECTIVE DATE: November 12, 2003.

FOR FURTHER INFORMATION CONTACT:

Aishe Allen or Michael Holton, AD/CVD Enforcement Group III, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482-0172 or (202) 482-1324, respectively.

Background

On September 25, 2002, the Department published a notice of initiation of this antidumping duty administrative review for the period of August 1, 2001 through July 31, 2002. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Requests for Revocation in Part and Deferral of Administrative Reviews* 67 FR 60210 (September 25, 2002).

On September 9, 2003, the Department published the preliminary results of antidumping duty administrative review. *See Preliminary Results of Antidumping Duty Administrative Review: Structural Steel Beams from the Republic of Korea*, 68 FR 53129 (September 9, 2003) ("Preliminary Results"). In the

Preliminary Results we stated that we would make our final determination for the antidumping duty administrative review no later than 120 days after the date of publication of the preliminary results, or not later than January 7, 2004.

Extension of Time Limit for Final Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("the Act"), states that if it is not practicable to complete the review within the time specified, the administering authority may extend the 120-day period, following the date publication of the preliminary results, to issues its final results by an additional 60 days. Completion of the final results within the 120-day period is not practicable due to the complexity of DSM's affiliation issue and INI's ordinary course of trade issue.

Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time limit for completion of these final results to by 30 days until no later than February 6, 2003.

Dated: November 4, 2003.

Joseph Spetrini,

Deputy Assistant Secretary for Import Administration, Group III.

[FR Doc. 03-28337 Filed 11-10-03; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 103003D]

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits (EFPs)

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notification of a proposal for EFPs to conduct experimental fishing; request for comments.

SUMMARY: NMFS announces that the Assistant Regional Administrator for Sustainable Fisheries, Northeast Region, NMFS (Assistant Regional Administrator) proposes to recommend that EFPs be issued in response to an application submitted by the Cape Cod Commercial Hook Fishermen's Association (CCCHFA), in collaboration with the New England Aquarium and NMFS. The EFP would allow up to six vessels to retain undersized Atlantic cod (*Gadus morhua*) in the area of the Great South Channel east onto Georges Bank

from December 2003 through November 2004. The Assistant Regional Administrator has made a preliminary determination that the application contains all of the required information and warrants further consideration and that the activities to be authorized under the EFPs would be consistent with the goals and objectives of the Northeast Multispecies Fishery Management Plan. However, further review and consultation may be necessary before a final determination is made to issue EFPs.

DATES: Comments on this action must be received on or before November 28, 2003.

ADDRESSES: Written comments should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, NE Regional Office, 1 Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope "Comments on CCCHFA Undersized Cod EFP Proposal." Comments may also be sent via fax to (978) 281-9135. Comments will not be accepted if submitted via e-mail or the Internet.

FOR FURTHER INFORMATION CONTACT: Heather Sagar, Fishery Management Specialist, phone: (978) 281-9341, fax: (978) 281-9135, email: heather.sagar@noaa.gov

SUPPLEMENTARY INFORMATION:

Background

On October 1, 2003, CCCHFA, in collaboration with the New England Aquarium and NMFS, submitted a complete application for up to six vessels to conduct a study on mortality rates and survivability of undersized Atlantic cod harvested in the bottom-set longline and jig fisheries in southern New England. Currently the mortality for undersized cod returned to the water is considered to be 100 percent, since there is little information to indicate otherwise. Exemptions would be necessary to relieve vessels from the restrictions on possession of undersized Atlantic cod at § 648.83(a). The proposed study would occur inside the area defined as follows: The outer Cape Cod shoreline at 42° N. lat. and 70° W. long., then follow the 70° W. long. line south to the northern border of the Nantucket Lightship Closed Area, then follow the northern border of the Nantucket Lightship Closed Area east to 69° W. long., then follow the 69° W. long. line north to the western border of Georges Bank Closed Area I, then follow the western border of Georges Bank Closed Area I (Loran C 13700) to the 42° N. lat. line, then follow the 42° N. lat. line west to 70° W. long. At no time

would fishing operations be conducted inside year-round closure areas.

The experiment would occur from December 2003 through November 2004, during which time longline vessels would sample at 20, 30, and 40 fathoms (36.6, 54.9, and 73.2 m, respectively) 3 times each, during each season, for a total of 36 trips (3 depths x 3 samples x 4 seasons = a total of 36 days). There will be six vessels participating in this study for a total of 36 trips for the experiment. Each vessel would fish its bottom-set longline gear consisting of 1,800 ft (548.6 m) of mainline with 300 #12 circle hooks spaced every 6 ft (1.83 m). Approximately 3,600 hooks would be set per fishing day, with a soak time of 3-4 hours. After the vessel sets the longline it would begin the jigging portion of the study. The undersized cod would be measured, weighed, and tagged to determine survivability rates of the undersized cod. The applicant would use two different handling techniques for all longline caught fish: Alternate fish would be flipped off the hook or snubbed (allowing the hook to pass through the jaw). All fish caught during the jigging portion would be flipped off the hook. During each season, a minimum of 150 undersized fish would be collected and retained for 72 hours in each cage at each of the sample depths. The cage would be constructed to hug tight to the sea floor and to resist rolling in the highly tidal areas. Other than the above protocol, the vessels would follow normal fishing practices. All fish landed would be subject to existing minimum size and trip limit requirements.

A scientific data collector would be present on board each participating vessel. Scientific data collectors would be responsible for collecting all relevant biological and environmental data. CCCHFA would be responsible for developing a full report of results and provide this report to NMFS.

Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 3, 2003.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
[FR Doc. 03-28210 Filed 11-10-03; 8:45 am]

BILLING CODE 3510-22-S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 030602141-3271-04]

Availability of Grants Funds for Fiscal Year 2004

AGENCY: National Sea Grant College Program, National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Notice of extension of application deadline.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) published a document in the **Federal Register** of October 17, 2003 (68 FR 59778), concerning the availability of NOAA grant funds for fiscal year 2004. NOAA publishes this notice to announce that the Sea Grant—Industry Fellowship Program, a Fellowship program initiated by the National Sea Grant Office (NSGO), National Oceanic and Atmospheric Administration (NOAA), has extended their submission date for applications. The submission date for applications for the Sea Grant—Industry Fellowship Program has been extended to February 3, 2004, to allow applicants more time to submit their applications. All applications must be received by 5 p.m. (local time) on February 3, 2004, by a State Sea Grant Program or by the National Sea Grant Office (NSGO) in the case of an institution of higher education in a non-Sea Grant State. Applications are to be forwarded to the NSGO by the State Sea Grant Programs by 5 p.m. e.s.t. on February 10, 2004. All other program requirements and information published in the October 17, 2003 notice remain the same.

DATES: All applications must be received by 5 p.m. (local time) on February 3, 2004, by a State Sea Grant Program or by the National Sea Grant Office (NSGO) in the case of an institution of higher education in a non-Sea Grant State.

ADDRESSES: For a list of addresses, please read the full notice. A copy of the full notice can be found at: <http://www.ofa.noaa.gov/%7Egrants/fbo/Oct-OAR-Industry-Fellow.pdf>.

FOR FURTHER INFORMATION CONTACT: Ms. Nikola Garber, 301-713-2431 ext. 124; e-mail: nikola.garber@noaa.gov.

Dated: November 4, 2003.

Louisa Koch,

Deputy Assistant Administrator, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 03-28271 Filed 11-10-03; 8:45 am]

BILLING CODE 3510-KA-M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Request for Public Comments on Commercial Availability Petition under the African Growth and Opportunity Act (AGOA) and the United States - Caribbean Basin Trade Partnership Act (CBTPA)

November 6, 2003.

AGENCY: The Committee for the Implementation of Textile Agreements

ACTION: Request for public comments concerning a petition for a determination that micro-denier 30 singles and 36 singles solution-dyed, open-end spun, staple spun viscose yarns, produced on open-ended spindles, cannot be supplied by the domestic industry in commercial quantities in a timely manner under the AGOA and CBTPA.

SUMMARY: On November 3, 2003, the Chairman of CITA received a petition from Fabritex alleging that micro-denier 30 singles and 36 singles solution-dyed, open-end spun, staple spun viscose yarns produced on open-ended spindles, for use in manufacturing fabrics, classified in subheading 5510.11.0000 of the Harmonized Tariff Schedule of the United States (HTSUS), cannot be supplied by the domestic industry in commercial quantities in a timely manner. The petition requests that apparel articles of U.S. formed fabrics of such yarns assembled in one or more AGOA or CBTPA beneficiary countries be eligible for preferential treatment under the AGOA and the CBTPA. CITA hereby solicits public comments on this petition, in particular with regard to whether this yarn can be supplied by the domestic industry in commercial quantities in a timely manner. Comments must be submitted by November 28, 2003 to the Chairman, Committee for the Implementation of Textile Agreements, Room 3001, United States Department of Commerce, 14th and Constitution, N.W., Washington, D.C. 20230.

FOR FURTHER INFORMATION CONTACT: Janet E. Heinzen, International Trade Specialist, Office of Textiles and

Apparel, U.S. Department of Commerce, (202) 482-3400.

SUPPLEMENTARY INFORMATION:

Authority: Section 112(b)(5)(B) of the AGOA; Section 213(b)(2)(A)(v)(II) of the CBERA, as added by Section 211(a) of the CBTPA; Sections 1 and 6 of Executive Order No. 13191 of January 17, 2001.

Background

The AGOA and the CBTPA provide for quota- and duty-free treatment for qualifying textile and apparel products. Such treatment is generally limited to products manufactured from yarns or fabrics formed in the United States. The AGOA and the CBTPA also provide for quota- and duty-free treatment for apparel articles that are both cut (or knit-to-shape) and sewn or otherwise assembled in one or more AGOA or CBTPA beneficiary countries from fabric or yarn that is not formed in the United States, if it has been determined that such fabric or yarn cannot be supplied by the domestic industry in commercial quantities in a timely manner. In Executive Order No. 13191, the President delegated to CITA the authority to determine whether yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner under the AGOA and the CBTPA and directed CITA to establish procedures to ensure appropriate public participation in any such determination. On March 6, 2001, CITA published procedures that it will follow in considering requests. (66 FR 13502).

On November 3, 2003, the Chairman of CITA received a petition from Fabritex alleging that micro-denier 30 singles and 36 singles solution-dyed, open-end spun, staple spun viscose yarn, produced on open-ended spindles, for use in manufacturing fabrics, classified in HTSUS subheading 5510.11.0000, cannot be supplied by the domestic industry in commercial quantities in a timely manner and requesting quota- and duty-free treatment under the AGOA and the CBTPA for apparel articles that are cut and sewn in one or more AGOA or CBTPA beneficiary countries from U.S. formed fabrics containing such yarns. Two petitions submitted by Fabritex on solution-dyed, open-end spun, staple spun viscose yarn were denied by CITA in May and August of 2001.

CITA is soliciting public comments regarding this request, particularly with respect to whether this yarn can be supplied by the domestic industry in commercial quantities in a timely manner. Also relevant is whether other yarns that are supplied by the domestic industry in commercial quantities in a

timely manner are substitutable for the yarn for purposes of the intended use. Comments must be received no later than November 28, 2003. Interested persons are invited to submit six copies of such comments or information to the Chairman, Committee for the Implementation of Textile Agreements, room 3100, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, DC 20230.

If a comment alleges that this yarn can be supplied by the domestic industry in commercial quantities in a timely manner, CITA will closely review any supporting documentation, such as a signed statement by a manufacturer of the yarn stating that it produces the yarns that are the subject of the request, including the quantities that can be supplied and the time necessary to fill an order, as well as any relevant information regarding past production.

CITA will protect any business confidential information that is marked "business confidential" from disclosure to the full extent permitted by law. CITA will make available to the public non-confidential versions of the request and non-confidential versions of any public comments received with respect to a request in room 3100 in the Herbert Hoover Building, 14th and Constitution Avenue, N.W., Washington, DC 20230. Persons submitting comments on a request are encouraged to include a non-confidential version and a non-confidential summary.

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 03-28341 Filed 11-10-03; 8:45 am]

BILLING CODE 3510-DR-S

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice. The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by December 12, 2003.

Title, Form Number, and OMB Number: Third Party Collection Program (Insurance Information); DD Form 2569; OMB Number 0704-0323.

Type of Request: Revision.

Number of Respondents: 511,232.

Responses Per Respondent: 1.
Annual Responses: 511,232
Average Burden Per Response: 2.5 minutes.

Annual Burden Hours: 20,961.
Needs and Uses: The information contained in the DD Form 2569 will be used to collect reimbursement from private insurers for medical care provided to family members of retirees and deceased Service members having health insurance. Such monetary benefits accruing to the Military Treatment Facility (MTF) will be used to enhance healthcare delivery in the MTF. Information will also be used by MTF staff and CHAMPUS Fiscal Intermediaries to determine eligibility for care, deductibles, and co-payments and by Health Affairs for program planning and management.

Affected Public: Individuals or Households.

Frequency: On Occasion and Annually.

Respondent's Obligation: Voluntary.
OMB Desk Officer: Mr. John Finley.
 Written comments and recommendations on the proposed information collection should be sent to Mr. Finley at the Office of Management and Budget, Desk Officer for DoD Health Affairs, Room 10235, New Executive Office Building, Washington, DC 20503.
DoD Clearance Officer: Ms. Jacqueline Davis.

Written requests for copies of the information collection proposal should be sent to Ms. Davis, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302.

Dated: October 29, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03-28248 Filed 11-10-03; 8:45 am]

BILLING CODE 5001-06-M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice. The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by December 12, 2003.

Title and OMB Number: Application for Commission in the U.S. Navy/U.S. Naval Reserve; OMB Number 0703-0029.

Type of Request: Reinstatement.
Number of Respondents: 10,000.
Responses Per Respondent: 1.
Annual Responses: 10,000.
Average Burden Per Response: 55 minutes (average).

Annual Burden Hours: 9,167.
Needs and Uses: All persons interested in entering the U.S. Navy or the U.S. Naval Reserve in a commissioned status must provide various personal data in order for a Selection Board to determine their qualifications for naval service and for specific fields of endeavor which the applicant intends to pursue. This information is used to recruit and select applicants who are qualified for commission in the U.S. Navy or U.S. Naval Reserve.

Affected Public: Individuals or Households.

Frequency: On Occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jacqueline Zeiher. Written comments and recommendations on the proposed information collection should be sent to Ms. Zeiher at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Ms. Jacqueline Davis. Written requests for copies of the information collection proposal should be sent to Ms. Davis, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302.

Dated: October 29, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03-28249 Filed 11-10-03; 8:45 am]

BILLING CODE 5001-06-M

DEPARTMENT OF DEFENSE

Office of the Secretary

Nationwide TRICARE Demonstration Project

AGENCY: Office of the Secretary of Defense for Health Affairs/TRICARE Management Activity, DoD.

ACTION: Notice extending deadline for demonstration project.

SUMMARY: On Monday, November 5, 2001, the Department of Defense (DoD) published a notice of a nationwide TRICARE demonstration project (66 FR 55928-55930). This notice is to advise interested parties of the continuation of the demonstration project in which the DoD Military Health System addresses unreasonable impediments to the

continuity of healthcare encountered by certain family members of Reservists and National Guardsmen called to active duty in support of a federal/contingency operation. The demonstration previously scheduled to end on November 1, 2003, is now extended through October 31, 2004.

FOR FURTHER INFORMATION CONTACT

Office of the Assistance Secretary of Defense for Health Affairs, TRICARE Management Activity, Communications and Customer Service Directorate at (703) 681-1774.

SUPPLEMENTARY INFORMATION: The continued deployment of over 160,000 troops in support of Noble Eagle/Operation Enduring Freedom and Operation Iraqi Freedom in FY 2003 and FY 2004 warrants the continuation of the demonstration to support the healthcare needs and morale of family members of activated reservists and guardsmen. The impact if the demonstration is not extended includes higher out-of-pocket costs and potential inability to continue to use the same provider for ongoing care. There are three separate components to the demonstration. First, those who participate in TRICARE Standard will not be responsible for paying the TRICARE Standard deductible. By law, the TRICARE Standard deductible for active duty dependents is \$150 per individual, \$300 per family (\$50/\$150 for E-4's and below). Second, TRICARE payments up to 115 percent of the TRICARE maximum allowable charge, less the applicable patient co-payment, for care received from a provider that does not participate (accept assignment) under TRICARE to the extent necessary to ensure timely access to care and clinically appropriate continuity of care. Third, waiver of the non-availability statement requirement for non-emergency inpatient care. At the end of this Project, DoD will conduct an analysis of the benefits and costs of providing healthcare services to certain Service members and their families when called to active duty during a contingently operation. Information and experience gained as part of this demonstration project will provide the foundation for longer-term solutions in the event of future national emergencies. This demonstration project is being conducted under the authority of 10 U.S.C. 1092.

Dated: October 29, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 03-28250 Filed 11-10-03; 8:45 am]

BILLING CODE 5001-06-M

DEPARTMENT OF DEFENSE**Office of the Inspector General****Privacy Act of 1974; System of Records**

AGENCY: Office of the Inspector General, DoD.

ACTION: Notice to Amend Systems of Records.

SUMMARY: The Office of the Inspector General, DoD, is amending a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on December 12, 2003 unless comments are received which result in a contrary determination.

ADDRESSES: Send comments to Office of the Inspector General, Department of Defense, 400 Army Navy Drive, Room 223, Arlington, VA 22202-4704.

FOR FURTHER INFORMATION CONTACT: Mr. Darryl R. Aaron at (703) 604-9785.

SUPPLEMENTARY INFORMATION: The Office of the Inspector General, DoD, systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the *Federal Register* and are available from the address above.

The specific changes to the records systems being amended are set forth below followed by the notices, as amended, published in their entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: October 29, 2003.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

CIG-06

SYSTEM NAME:

Investigative Files (Files (February 22, 1993, 58 FR 10213).

Changes

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SYSTEM LOCATION:

Delete entry and replace with "Primary location: Office of the Deputy Inspector General for Investigations, Defense Criminal Investigative Service, Office of the Inspector General, Department of Defense, 400 Army Navy Drive, Arlington, VA 22202-4704.

DECENTRALIZED LOCATIONS:

Regional Field Offices; Resident Agencies; and various other OIG DoD Offices. A complete list of these decentralized locations can be obtained by writing to the 'System manager'."

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with "Reports of Investigations (ROIs), Information Reports (IRs) and criminal intelligence reports containing statements of witnesses, suspects, subject(s) and special agents; laboratory reports, polygraph records to include charts, reports, technical data, rights waivers, polygraph waivers, numerical score sheets, interview logs, test questions sheets, and all other documents relating to the polygraphs, all consensual or non consensual monitoring, documentary evidence, physical evidence, summary and administrative data pertaining to preparation and distribution of the report; basis for allegations; investigative information from Federal, State, and local investigative and intelligence agencies and departments and all correspondence relevant to the investigation, location of investigation, year and date of offense, names and personal identifiers of persons who have been subjects of electronic surveillance, suspects, subjects witnesses and victims of crimes, report number which allows access to records noted above; agencies, firms, and Defense Department organizations which were the subject(s) or victim(s) of criminal investigations; and disposition and suspense of offenders listed in criminal investigative files, agents notes, working papers, confidential source documents, subpoenas, Grand Jury documents, finger print cards, witness identification data, requests approvals for case openings and or closings, special investigative techniques requiring approval by management, and any other miscellaneous documents supporting the case files."

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "Inspector General Act of 1978 (Pub. L. 95-452), as amended; DoD Directive 5106.1, Inspector General of the Department of Defense; and E.O. 9397 (SSN)."

PURPOSE(S):

Delete entry and replace with "To conduct criminal investigations, crime prevention and criminal intelligence activities, to accomplish management studies involving the analysis, compilation of statistics, quality control,

to ensure that completed investigations are legally sufficient and result in overall improvement in techniques, training and professionalism. Includes personnel security, internal security, criminal, and other law enforcement matters, all of which are essential to the effective operation of the Office of the Inspector General.

The records in this system are used for the following purposes: Suitability, loyalty, eligibility, and general trustworthiness of individuals for access or continued access to classified information and suitability for access to government facilities or industrial firms engaged in government projects/ contracts; contractor responsibility and suspension/debarment determinations; suitability for awards or similar benefits; use in current law enforcement investigation or program of any type; use in judicial or adjudicative proceedings including litigation or in accordance with a court order; to identify offenders, to provide facts and evidence upon which to base prosecution, to provide information to other investigative elements of the Department of Defense, other Federal, State, or local agencies having jurisdiction over the substance of the allegations or a related investigative interest in criminal law enforcement investigations including statutory violations, counter-intelligence, counter-espionage and counter-terrorist activities and other security matters; to effect corrective administrative action and to recover money and property which has been wrongfully used or misappropriated; to make statistical evaluations and reports; to make decisions affecting personnel actions concerning members of the Armed Forces and/or Federal employees; and to respond to other complaint investigations and congressional inquiries as appropriate."

* * * * *

RETRIEVABILITY:

Delete entry and replace with "Records are retrieved by individual's name, Social Security Number, Military Service Number, or case control number."

* * * * *

RETENTION AND DISPOSAL:

Delete entry and replace with "Investigative Case files and Information Reports are maintained in the office of origin for two years after case closure and then transferred to the OIG DoD Headquarters for final preparation and final transfer to the Washington National Records Center where they are retained for 20 years and

10 years, respectively, and ultimately destroyed.

Those records which attract great public or judicial attention or document a historical development in the OIG DoD may be deemed permanent and transferred directly to the National Archives and Records Administration."

* * * * *

CIG-06

SYSTEM NAME:

Investigative Files.

SYSTEM LOCATION:

Primary location: Office of the Deputy Inspector General for Investigations, Defense Criminal Investigative Service, Office of the Inspector General, Department of Defense, 400 Army Navy Drive, Arlington, VA 22202-4704.

DECENTRALIZED LOCATIONS:

Regional Field Offices; Resident Agencies; and various other OIG DoD Offices. A complete list of these decentralized locations can be obtained by writing to the 'System manager'.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DoD civilian personnel; members of the Armed Forces of the United States, Reserve components, and National Guard units; DoD contractors; individuals residing on, having authorized official access to, or contracting or operating any business or other functions at any DoD installation or facility; and individuals not affiliated with the Department of Defense when their activities have directly threatened the functions, property or personnel of the Department of Defense, or they have threatened any other high ranking government personnel who are provided protective service mandated by the Secretary of Defense, or they have engaged in, or are alleged to engage in criminal acts on DoD installations or directed at the Department of Defense, its personnel or functions; or individuals information regarding DoD activities falling under the purview of OIG responsibilities.

CATEGORIES OF RECORDS IN THE SYSTEM:

Reports of Investigations (ROIs), Information Reports (IRs) and criminal intelligence reports containing statements of witnesses, suspects, subject(s) and special agents; laboratory reports, polygraph records to include charts, reports, technical data, rights waivers, polygraph waivers, numerical score sheets, interview logs, test questions sheets, and all other documents relating to the polygraphs, all consensual or non consensual

monitoring, documentary evidence, physical evidence, summary and administrative data pertaining to preparation and distribution of the report; basis for allegations; investigative information from Federal, State, and local investigative and intelligence agencies and departments and all correspondence relevant to the investigation, location of investigation, year and date of offense, names and personal identifiers of persons who have been subjects of electronic surveillance, suspects, subjects witnesses and victims of crimes, report number which allows access to records noted above; agencies, firms, and Defense Department organizations which were the subject(s) or victim(s) of criminal investigations; and disposition and suspense of offenders listed in criminal investigative files, agents notes, working papers, confidential source documents, subpoenas, Grand Jury documents, finger print cards, witness identification data, requests approvals for case openings and or closings, special investigative techniques requiring approval by management, and any other miscellaneous documents supporting the case files.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Inspector General Act of 1978 (Pub. L. 95-452), as amended; DoD Directive 5106.1, Inspector General of the Department of Defense; and E.O. 9397 (SSN).

PURPOSE(S):

To conduct criminal investigations, crime prevention and criminal intelligence activities, to accomplish management studies involving the analysis, compilation of statistics, quality control, to ensure that completed investigations are legally sufficient and result in overall improvement in techniques, training and professionalism. Includes personnel security, internal security, criminal, and other law enforcement matters, all of which are essential to the effective operation of the Office of the Inspector General.

THE RECORDS IN THIS SYSTEM ARE USED FOR THE FOLLOWING PURPOSES:

Suitability, loyalty, eligibility, and general trustworthiness of individuals for access or continued access to classified information and suitability for access to government facilities or industrial firms engaged in government projects/contracts; contractor responsibility and suspension/debarment determinations; suitability for awards or similar benefits; use in current law enforcement investigation

or program of any type; use in judicial or adjudicative proceedings including litigation or in accordance with a court order; to identify offenders, to provide facts and evidence upon which to base prosecution, to provide information to other investigative elements of the Department of Defense having jurisdiction over the substance of the allegations or a related investigative interest in criminal law enforcement investigations including statutory violations, counter-intelligence, counter-espionage and counter-terrorist activities and other security matters; to effect corrective administrative action and to recover money and property which has been wrongfully used or misappropriated; to make statistical evaluations and reports; to make decisions affecting personnel actions concerning members of the Armed Forces and or Federal employees; and to respond to other complaint investigations and congressional inquiries as appropriate.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To the U.S. Secret Service in conjunction with the protection of persons under its jurisdiction.

To other Federal, State, or local agencies having jurisdiction over the substance of the allegations or a related investigative interest in criminal law enforcement investigations including statutory violations, counter-intelligence, counter-espionage and counter-terrorist activities and other security matters.

The DoD 'Blanket Routine Uses' set forth at the beginning of the OIG's compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored on paper in file folders and on electronic storage media.

RETRIEVABILITY:

Records are retrieved by individual's name, Social Security Number, Military Service Number, or case control number.

SAFEGUARDS:

Office is locked and building is protected by guards during non-duty

hours. All OIG records are stored in locked safes and are accessible only to authorized personnel who have a need-to-know in conjunction with their official duties. Computerized listings are password protected.

RETENTION AND DISPOSAL:

Investigative Case files and Information Reports are maintained in the office of origin for two years after case closure and then transferred to the OIG DoD Headquarters for final preparation and final transfer to the Washington National Records Center where they are retained for 20 years and 10 years, respectively, and ultimately destroyed.

Those records which attract great public or judicial attention or document a historical development in the OIG DoD may be deemed permanent and transferred directly to the National Archives and Records Administration.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Internal Operations
Directorate, Office of the Deputy
Inspector General for Investigations,
Defense Criminal Investigative Service,
Office of the Inspector General of the
Department of Defense, 400 Army Navy
Drive, Arlington, VA 22202-4704.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Chief, Freedom of Information Act/Privacy Act Office, 400 Army Navy Drive, Arlington, VA 22202-4704.

Written requests should contain the individual's full name (including former names and aliases), and Social Security Number, current home address, telephone number, and the request must be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Chief, Freedom of Information Act/Privacy Act Office, 400 Army Navy Drive, Arlington, VA 22202-4704.

Written requests should contain the individual's full name (including former names and aliases), and Social Security Number, current home address, telephone number, and the request must be signed.

CONTESTING RECORD PROCEDURES:

The OIG's rules for accessing records and for contesting contents and appealing initial agency determinations are published in 32 CFR part 312 or may be obtained from the system manager.

RECORD SOURCE CATEGORIES

Subjects and suspects of OIG investigations. Interview of witnesses, victims, and confidential sources. All types of records and information maintained by all levels of government, private industry, and non-profit organizations reviewed during the course of the investigation or furnished the OIG. Any other type of record deemed necessary to complete the OIG investigation.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency that performs as its principle function any activity pertaining to the enforcement of criminal laws.

An exemption rule for this record system has been promulgated in accordance with the requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and published in 32 CFR part 312. For additional information contact the system manager.

[FR Doc. 03-28251 Filed 11-10-03; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Department of the Air Force

Request for Public Comment of Draft Preliminary Proposed Interface Revision (PPIRN) to L5 Civil Signal Interface Specification (IS)

AGENCY: Department of the Air Force, DoD.

ACTION: Notice and request for review/comment of draft PPIRN-705-001.

SUMMARY: This notice informs the public that the Global Positioning System (GPS) Joint Program Office (JPO) has released the current draft of PPIRN-705-001 dated 23 Oct 03 to IS-GPS-705, Navstar GPS Space Segment/User Segment L5 Interfaces, for public review and comment. This PPIRN describes the improved clock and ephemeris (ICE) message for L5, a signal to be incorporated into the GPS system for the benefit of the civilian community. The draft PPIRN can be reviewed at the following Web site: <http://gps.losangeles.af.mil>. Click "System Engineering," then click "Public Interface Control Working Group (ICWG)". Hyperlinks to the PPIRN and review instructions are provided. The reviewer should save the PPIRN to a local memory location prior to opening and performing the review. All comments and their resolutions will be posted to the Web site.

ADDRESSES: Submit comments to SMC/GPERC, 2420 Vela Way, Suite 1467, El Segundo CA 90245-4659. A comment matrix is provided for your convenience at the web site and is the preferred method of comment submittal. Comments may be submitted to the following Internet address: smc.gperc@losangeles.af.mil. Comments may also be sent by fax to 1-310-363-6387.

DATES: The suspense date for comment submittal is December 12, 2003.

FOR FURTHER INFORMATION CONTACT: GPERC, GPS JPO System Engineering Division at 1-310-363-2883, or write to the address above.

SUPPLEMENTARY INFORMATION: The civilian and military communities use the Global Positioning System, which employs a constellation of 24 satellites to provide continuously transmitted signals to enable appropriately configured GPS user equipment to produce accurate position, navigation and time information.

Pamela D. Fitzgerald,

Air Force Federal Register Liaison Officer.

[FR Doc. 03-28332 Filed 11-10-03; 8:45 am]

BILLING CODE 5001-05-P

DEPARTMENT OF DEFENSE

Department of the Air Force

Request for Public Comment of L5 Civil Signal Interface Specification (IS) Revision 3

AGENCY: Department of the Air Force, DoD.

ACTION: Notice and request for review/comment of IS-GPS-705 Revision 3.

SUMMARY: This notice informs the public that the Global Positioning System (GPS) Joint Program Office (JPO) has released the current IS-GPS-705 dated 30 Sep 03, Navstar GPS Space Segment/User Segment L5 Interfaces, for public review and comment. This IS describes the interface characteristics of L5, a signal to be incorporated into the GPS system for the benefit of the civilian community. The IS can be reviewed at the following Web site: <http://gps.losangeles.af.mil>. Click "System Engineering," then click "Public Interface Control Working Group (ICWG)". Hyperlinks to the IS and review instructions are provided. The reviewer should save the IS to a local memory location prior to opening and performing the review. All comments and their resolutions will be posted to the Web site.

ADDRESSES: Submit comments to SMC/GPERC, 2420 Vela Way, Suite 1467, El Segundo CA 90245-4659. A comment matrix is provided for your convenience at the web site and is the preferred method of comment submittal. Comments may be submitted to the following Internet address: smc.gperc@losangeles.af.mil. Comments may also be sent by fax to 1-310-363-6387.

DATES: The suspense date for comment submittal is November 14, 2003.

FOR FURTHER INFORMATION CONTACT: GPERC, GPS JPO System Engineering Division at 1-310-363-2883, or write to the address above.

SUPPLEMENTARY INFORMATION: The civilian and military communities use the Global Positioning System, which employs a constellation of 24 satellites to provide continuously transmitted signals to enable appropriately configured GPS user equipment to produce accurate position, navigation and time information.

Pamela D. Fitzgerald,

Air Force Federal Register Liaison Officer.

[FR Doc. 03-28333 Filed 11-10-03; 8:45 am]

BILLING CODE 5001-05-P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Government-Owned Inventions; Available for Licensing

AGENCY: Department of the Navy, DOD.

ACTION: Notice.

SUMMARY: The invention listed below is assigned to the United States Government as represented by the Secretary of the Navy and is available for licensing by the Department of the Navy. Patent application 10/662,169: FAST RESPONSE FLUID CONTROL VALVE/NOZZLE.

ADDRESSES: Requests for copies of the invention cited should be directed to the Naval Surface Warfare Center, Crane Div, Code OCF, Bldg 64, 300 Highway 361, Crane, IN 47522-5001.

FOR FURTHER INFORMATION CONTACT: Mr. Darrell Boggess, Naval Surface Warfare Center, Crane Div, Code OCF, Bldg 64, 300 Highway 361, Crane, IN 47522-5001, telephone (812) 854-1130. To download an application for license, see: http://www.crane.navy.mil/newscommunity/TechTrans_CranePatents.asp?bhcp=1. (Authority: 35 U.S.C. 207, 37 CFR part 404.)

Dated: November 3, 2003.

S. K. Melancon,

Paralegal Specialist, Office of the Judge Advocate General, Alternate Federal Register Liaison Officer.

[FR Doc. 03-28334 Filed 11-10-03; 8:45 am]

BILLING CODE 3810-FF-P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Sunshine Act Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given of the Defense Nuclear Facilities Safety Board's (Board) two meetings described below. The Board will also conduct a series of public hearings pursuant to 42 U.S.C. 2286b and invites any interested persons or groups to present any comments, technical information, or data concerning safety issues related to the matters to be considered.

TIME AND DATE OF MEETING: 9 a.m., December 3, 2003, and 9 a.m., December 4, 2003.

PLACE: Defense Nuclear Facilities Safety Board, Public Hearing Room, 625 Indiana Avenue, NW., Suite 300, Washington, DC 20004-2001. Additionally, as a part of the Board's E-Government initiative, the meetings will be presented live through Internet video streaming. A link to these presentations will be available on the Board's Web site (<http://www.dnfsb.gov>).

STATUS: Open. While the Government in the Sunshine Act does not require that the scheduled discussions be conducted in a meeting, the Board has determined that open meetings in this specific case further the public interests underlying both the Sunshine Act and the Board's enabling legislation.

MATTERS TO BE CONSIDERED: The Board has been reviewing the Department of Energy's (DOE) current oversight and management of the contracts and contractors it relies upon to accomplish the mission assigned to DOE under the Atomic Energy Act of 1954, as amended. We will focus on what impact, if any, DOE's new initiatives may have or might have had upon assuring adequate protection of the health and safety of the public and workers at DOE's defense nuclear facilities. The fourth and fifth public meetings will collect information needed to understand and address any health or safety concerns that may require Board action. This will include, but is not limited to, presentations by DOE and the National Nuclear Security Administration (NNSA) to explain their contract management and oversight

initiatives and possibly further presentations by Board staff.

The Board has identified several key areas that will be examined in public meetings. The Board will explore in more depth the field application of Federal management and oversight policies being developed by DOE and NNSA for defense nuclear facilities. The Board will hear from NNSA Site Managers and Contractor General Managers during the December 3rd meeting and from DOE Environmental Management Site Managers and Contractor General Managers during the December 4th meeting. The information gathered will explore Federal contract management and oversight experience and will provide relevant reference experience. The public hearing portions are independently authorized by 42 U.S.C. § 2286b.

FOR FURTHER INFORMATION CONTACT:

Kenneth M. Pusateri, General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004-2901, (800) 788-4016. This is a toll-free number.

SUPPLEMENTARY INFORMATION: Requests to speak at the hearings may be submitted in writing or by telephone. The Board asks that commentators describe the nature and scope of their oral presentation. Those who contact the Board prior to close of business on December 2, 2003, will be scheduled for time slots, beginning at approximately 11:30 a.m., for the December 3rd meeting. Those who contact the Board prior to close of business on December 3, 2003, will be scheduled for time slots, beginning at approximately 11:30 a.m., for the December 4th meeting. The Board will post a schedule for those speakers who have contacted the Board before each hearing. The posting will be made at the entrance to the Public Hearing Room at the start of each 9 a.m. meeting.

Anyone who wishes to comment or provide technical information or data may do so in writing, either in lieu of, or in addition to, making an oral presentation. The Board Members may question presenters to the extent deemed appropriate. Documents will be accepted at the meeting or may be sent to the Defense Nuclear Facilities Safety Board's Washington, DC office. The Board will hold the record open until January 5, 2005, for the receipt of additional materials. Transcripts of the meetings will be made available by the Board for inspection by the public at the Defense Nuclear Facilities Safety Board's Washington office and at DOE's public reading room at the DOE Federal

Building, 1000 Independence Avenue, SW., Washington, DC 20585.

The Board specifically reserves its right to further schedule and otherwise regulate the course of the meetings and hearings, to recess, reconvene, postpone, or adjourn the meetings and hearings, conduct further reviews, and otherwise exercise its power under the Atomic Energy Act of 1954, as amended.

Dated: November 7, 2003.

John T. Conway,
Chairman.

[FR Doc. 03-28456 Filed 11-7-03; 3:25 pm]

BILLING CODE 3670-01-P

DEPARTMENT OF ENERGY

Office of Science Financial Assistance Program Notice DE-FG01-04ER04-05; Early Career Principal Investigator Program in Applied Mathematics, Collaboratory Research, Computer Science, and High-Performance Networks

AGENCY: Department of Energy.

ACTION: Notice inviting grant applications.

SUMMARY: The Office of Advanced Scientific Computing Research (ASCR) of the Office of Science (SC), U.S. Department of Energy (DOE), hereby announces its interest in receiving applications for grant applications in support of its Early Career Principal Investigator Program. The purpose of this program is to support research in applied mathematics, collaboratory research, computer science, and networks performed by exceptionally talented scientists and engineers early in their careers. The full text of Program Notice DE-FG01-04ER04-05, is available via the Internet using the following Web site address: <http://www.science.doe.gov/production/grants/grants.html>.

DATES: To permit timely consideration for award in Fiscal Year 2004, completed applications in response to this notice must be received by February 10, 2004, to be accepted for merit review and funding in Fiscal Year 2004.

ADDRESSES: Formal applications referencing Program Notice DE-FG01-04ER04-05 must be sent electronically by an authorized institutional business official through DOE's Industry Interactive Procurement System (IIPS) at: <http://e-center.doe.gov/>. IIPS provides for the posting of solicitations and receipt of applications in a paperless environment via the Internet. In order to submit applications through IIPS, your business official will need to

register at the IIPS website. IIPS offers the option of using multiple files, please limit submissions to one volume and one file if possible, with a maximum of no more than four PDF files. The Office of Science will include attachments as part of this notice that provide the appropriate forms in PDF fillable format that are to be submitted through IIPS. Color images should be submitted in IIPS as a separate file in PDF format and identified as such. These images should be kept to a minimum due to the limitations of reproducing them. They should be numbered and referred to in the body of the technical scientific grant application as Color image 1, Color image 2, etc. Questions regarding the operation of IIPS may be E-mailed to the IIPS Help Desk at:

HelpDesk@pr.doe.gov, or you may call the help desk at: (800) 683-0751. Further information on the use of IIPS by the Office of Science is available at: <http://www.sc.doe.gov/production/grants/grants.html>.

If you are unable to submit an application through IIPS, please contact the Grants and Contracts Division, Office of Science at: (301) 903-5212 or (301) 903-3604, in order to gain assistance for submission through IIPS or to receive special approval and instructions on how to submit printed applications.

FOR FURTHER INFORMATION, CONTACT: Dr. Samuel J. Barish, Office of Advanced Scientific Computing Research, SC-31/ Germantown Building, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585-1290, Telephone: (301) 903-5800, E-mail: sam.barish@science.doe.gov.

SUPPLEMENTARY INFORMATION:

Program Mission

The mission of the Advanced Scientific Computing Research Program is to deliver forefront computational and networking capabilities to scientists nationwide that enable them to extend the frontiers of science, answering critical questions that range from the function of living cells to the power of fusion energy.

In order to accomplish this mission, this program fosters and supports fundamental research in advanced computing research (applied mathematics, computer science and networking), and operates supercomputer, networking, and related facilities to enable the analysis, modeling, simulation, and prediction of complex phenomena important to DOE.

The following long-term goals will be indicators of ASCR's success in meeting its mission:

- Develop mathematics, algorithms, and software that enable effective models of complex systems, including highly nonlinear or uncertain phenomena, or processes that interact on vastly different scales or contain both discrete and continuous elements.

- Develop, through the Genomes to Life partnership with the DOE Office of Biological and Environmental Research, the computational science capability to model a complete microbe and a simple microbial community.

The primary mission of the ASCR program is carried out by the Mathematical, Information, and Computational Sciences (MICS) Division. This Division is responsible for discovering, developing, and deploying advanced scientific computing and communications tools and operating the high performance computing and network facilities that researchers need to analyze, model, simulate, and—most importantly—predict the behavior of complex natural and engineered systems of importance to SC and to DOE.

The computing, networking middleware required to meet SC needs exceed the state-of-the-art by a wide margin. Furthermore, the algorithms, the software tools, the software libraries, and the distributed software environments needed to accelerate scientific discovery through modeling and simulation are beyond the realm of commercial interest. To establish and maintain DOE's modeling and simulation leadership in scientific areas that are important to its mission, the MICS program employs a broad, but integrated, research strategy. The basic research portfolio in applied mathematics and computer science provides the foundation for enabling research activities, which includes efforts to advance high-performance networking, to develop software tools, software libraries, and software environments. Results from enabling research supported by the MICS program are used by computational scientists supported by other SC and other DOE programs.

Further descriptions of the base research portion of the MICS portfolio, which is the scope of this Notice, are provided below:

Applied Mathematical Sciences Research

The objective of the applied mathematics component of the MICS research portfolio is to support research on the underlying mathematical understanding as well as the numerical algorithms needed to enable effective description and prediction of physical,

chemical, and biological systems such as fluids, materials, magnetized plasmas, or protein molecules. This includes, but is not limited to, methods for solving large systems of partial differential equations (PDEs) on parallel computers, techniques for choosing optimal values for parameters in large systems with hundreds to hundreds of thousands of parameters, improving our understanding of fluid turbulence, and developing techniques for reliably estimating the errors in simulations of complex physical phenomena.

In addition to the existing research topics described, MICS plans to invest in new areas of applied mathematics research to support DOE's mission. Such investments may include research in multiscale algorithms, the mathematics of feature identification in large datasets, asymptotically optimal algorithms for solving PDEs, fast multipole and related hybrid methods, and algorithms for handling complex systems with constraints. The MICS research portfolio in Applied Mathematics emphasizes investment in long-term research that will result in the next generation of computational tools for scientific discovery.

Collaboratory Research

Collaboratories link geographically dispersed researchers, data, and tools via high performance networks to enable remote access to facilities, access to large datasets, shared environments, and ease of collaboration. The objective of the collaboratory component of the MICS portfolio is to support research for developing the software infrastructure that will enable universal, ubiquitous, easy access to remote resources or that will contribute to the ease with which distributed teams work together. Enabling high performance for distributed scientific applications is an important consideration. The middleware component for collaboratories encompasses activities in:

- Building the application frameworks that allow discipline scientists to express and manage the simulation, analysis, and data management aspects of overall problem solving.
- Supporting construction, management, and use of widely distributed application systems.
- Facilitating human collaboration through common security services, and resource and data sharing.
- Providing remote access to, and operation of, scientific and engineering instrumentation systems.

- Managing and securing the computing and data infrastructure as a persistent service.

This announcement also calls for grant applications to address the fundamental issues involved in providing uniform software services that manage and provide access to heterogeneous, distributed resources, that is, high-performance middleware services that support DOE's science mission. The emphasis is on investment in long-term research that will result in the next generation of high-performance software infrastructure for scientific discovery.

Computer Science Research

The objective of the computer science component of the MICS research portfolio is to support research that results in a comprehensive, scalable, and robust high performance software infrastructure that translates the promise and potential of high peak performance to real performance improvements in DOE scientific applications. This software infrastructure must address needs for: Portability and interoperability of complex high performance scientific software packages; operating systems tools and support for the effective management of terascale and beyond systems; and effective tools for feature identification, data management, and visualization of petabyte-scale scientific data sets. The Computer Science component encompasses a multi-discipline approach with activities in:

- Program development environments and tools—Component-based, fully integrated, terascale program development and runtime tools, which scale effectively and provide maximum performance, functionality, and ease-of-use to developers and scientific end users.
- Operating system software and tools—Systems software that scales to tens of thousands of processors, supports high performance application-level communication, and provides the highest levels of performance, fault tolerance, reliability, manageability, and ease of use for system administrators, tool developers, and end users.
- Visualization and data management systems—Scalable, intuitive systems fully supportive of DOE application requirements for moving, storing, analyzing, querying, manipulating, and visualizing multi-petabytes of scientific data and objects.
- Problem Solving Environments—Unified systems focused on the needs of specific scientific applications, which enable radically improved ease-of-use of

complex systems software and tools by domain application scientists.

The MICS research portfolio in Computer Science emphasizes investment in long-term research that will result in the next generation of high performance tools for scientific discovery.

High-Performance Networks Research

In the next few years, complex science experiments in DOE are expected to generate several petabytes of data that will be transferred to geographically distributed terascale computing facilities for analysis and visualization by thousands of scientists across the world. In addition, many emerging energy research problems require coordinated access to distributed resources—people, data, computers, and facilities. This emerging, distributed terascale-science environment calls for ultra-high-speed networks—networks that can deliver multi-gigabits/sec throughput to scientific applications securely. Grant applications in network research must therefore address the issues of ultra high-speed networks by focusing on:

- Ultra high-speed network protocols—innovative, new approaches to transport protocols and dynamic provisioning technologies for ultra-high-speed networks that will enable large-scale distributed science applications to efficiently harness the abundant bandwidth made possible by Dense Wave Division Multiplexing (DWDM) optical technologies. For ultra-high-speed transport protocols, this may include, but is not limited to, significant modifications to existing transport protocols, such as UDP, TCP, TCP variants, and TCP alternatives that can deliver multi-gigabit throughput to high-end scientific applications. For dynamic provisioning, the focus is on advanced network technologies for agile DWDM networking that offer bandwidth on-demand, scheduled end-to-end bandwidth, differentiated DWDM services, and DWDM traffic engineering. Respondents must address the theoretical foundations of the proposed work with rigorous mathematical and algorithm principles.

- Performance evaluation of cyber security systems—formal techniques for modeling and evaluating the performance and effectiveness of cyber security systems and policies. This may include techniques for formal specification of cyber security requirements and implementation.

- Ultra-high-speed network services—advanced network-aware services that enable the efficient, effective, and secure utilization of ultra-

high-speed networks for data transfers over long distances.

- Optimization techniques for complex networks—advanced stochastic optimization techniques that can be used to characterize complex traffic processes in large-scale networks. This may include, but is not limited to, computational intelligence, chaos theory, large-scale simulations, and multi-scale theory.

Grant applications addressing the above problems must go beyond the development of tools and emphasize mathematical analysis, formal specification, and rigorous techniques for validating the performance of their proposed solutions.

Background: Early Career Principal Investigator Program

This is the third year of the Early Career Principal Investigator Program. A principal goal of this program is to identify exceptionally talented applied mathematicians, collaborative researchers, computer scientists, and high-performance networks researchers early in their careers and assist and facilitate the development of their research programs. Eligibility for awards under this notice is restricted to applicants who meet all of the following criteria:

(1) Be employed in a tenure-track position (or tenure-track-equivalent position) as an assistant professor (or equivalent title).

(2) Are conducting research in applied mathematics, collaborative, computer science, or high-performance networks.

Applications should be submitted through a U.S. academic institution. Applicants should request support under this notice for normal research project costs as required to conduct their proposed research activities, such as part of the PI's salary, graduate and/or undergraduate students, post-doctoral researchers, equipment and facilities, and travel. However, no salary support will be provided for other faculty members or senior personnel.

Applicants who have submitted or will be submitting similar grant applications to other programs are eligible for this notice, as long as the details of the other submission are contained in the grant application to DOE. Applicants who have an NSF CAREER award, or are applying for such an award, are eligible for this notice. Applicants do not have to be U.S. citizens, and may be non-permanent resident aliens or have an H1b visa.

Program Funding

It is anticipated that up to \$2 million will be available for up to twenty (20) awards for exceptional applications in Fiscal Year 2004, to meet the needs of the program, contingent upon the availability of appropriated funds. The maximum support that can be requested under this notice is \$100,000 per year for three years.

Multiple-year funding of grant awards is expected, with funding provided on an annual basis subject to the availability of funds, progress of the research, and programmatic needs. The typical duration of these grants is three years, and they will not normally be renewed after the project period has been completed. It is anticipated that at the end of the grant period, grantees will submit new grant applications to continue their research to DOE or other Federal funding agencies. We expect that the awards will be announced and the projects will begin in early summer 2004.

Merit Review

Applications will be subjected to scientific merit review (peer review) and will be evaluated against the following evaluation criteria, which are listed in descending order of importance as codified at 10 CFR 605.10(d):

- (1) Scientific and/or Technical Merit of the Project;
- (2) Appropriateness of the Proposed Method or Approach;
- (3) Competency of Applicant's Personnel and Adequacy of Proposed Resources;
- (4) Reasonableness and Appropriateness of the Proposed Budget.

The evaluation of applications under item 1, Scientific and Technical Merit, will pay attention to the responsiveness of the proposed research to the challenges of the MICS base research programs in Applied Mathematics, Collaboratory Research, Computer Science, and Network Research.

It is expected that the application will include involvement of graduate and/or undergraduate students in the proposed work.

Applicants are encouraged to collaborate with DOE National Laboratory researchers. The collaborations may include one, or more, extended visits to the laboratory by the applicant each year. Such an arrangement, if proposed, must be clearly explained in the grant application. Furthermore, a letter of support from the DOE National Laboratory collaborator(s) should be included with the application. A list of

the DOE National Laboratories can be found at: http://www.sc.doe.gov/sub/lab_map/index.htm.

Grantees under the Early Career Principal Investigator Program may apply for access to high-performance computing and network resources at several National Laboratories. Such resources include, but are not limited to, the National Energy Research Scientific Computing (NERSC) Center: <http://www.sc.doe.gov/ascr/mics/nersc/index.html>; the Advanced Computing Research Testbeds <http://www.sc.doe.gov/ascr/mics/acrt/index.html>; the Energy Sciences Network <http://www.sc.doe.gov/ascr/mics/esnet/index.html>; and the High-Performance Networking Research effort at the Oak Ridge National Laboratory; <http://www.csm.ornl.gov/net>.

The evaluation under item 2, Appropriateness of the Proposed Method or Approach, will consider the quality of the proposed plan, if any, for interacting with a DOE National Laboratory.

Please note that external peer reviewers are selected with regard to both their scientific expertise in the subject area of the grant application and the absence of conflict-of-interest issues. Non-federal reviewers will often be used, and submission of an application constitutes agreement that this is acceptable to the investigator and the submitting institution.

Submission Information

Each grant application submitted should clearly indicate on which of the four following components of the MICS research portfolio the application is focused: Applied Mathematical Sciences Research, Collaboratory Research, Computer Science Research, or High-Performance Networks Research.

The Project Description should be 20 pages or less, exclusive of the bibliography and other attachments. It must contain an abstract or project summary on a separate page with the name of the applicant, mailing address, phone, Fax and E-mail listed, and a short curriculum vita for the applicant.

To provide a consistent format for the submission, review, and solicitation of grant applications under this notice, the preparation and submission of grant applications must follow the guidelines given in the Application Guide for the Office of Science Financial Assistance Program, 10 CFR part 605. Access to SC's Financial Assistance Application Guide is possible via the World Wide Web at: <http://www.science.doe.gov/production/grants/grants.html>. DOE is under no obligation to pay for any costs

associated with the preparation or submission of applications if an award is not made.

(The Catalog of Federal Domestic Assistance number for this program is 81.049, and the solicitation control number is ERFAP 10 CFR part 605.)

Issued in Washington, DC, on November 3, 2003.

John Rodney Clark,

Associate Director of Science for Resource Management.

[FR Doc. 03-28318 Filed 11-10-03; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Office of Science Financial Assistance Program Notice DE-FG01-04ER04-03; High-Performance Network Research: Scientific Discovery Through Advanced Computing (SciDAC) and Mathematical, Informational, and Computational Sciences (MICS)

AGENCY: Department of Energy.

ACTION: Notice inviting grant applications.

SUMMARY: The Office of Advanced Scientific Computing Research (OASCR) of the Office of Science (SC), in the U.S. Department of Energy (DOE), hereby announces its interest in receiving grant applications for projects in the high-performance network research program. Opportunities exist for research with a primary focus on integrated experimental networks to support high-impact applications in the Scientific Discovery through Advanced Computing (SciDAC) program and for ultra high-speed network technologies under the Mathematical, Computational, and Information Sciences (MICS) Division. More specific information on this solicitation is outlined in the supplementary information section below.

DATES: Potential applicants are strongly encouraged to submit a brief preapplication. All preapplications, referencing Program Notice DE-FG01-04ER04-03, should be received by DOE by 4:30 p.m., e.s.t., December 15, 2003. A response to the preapplications encouraging or discouraging a formal application generally will be communicated to the applicant within 14 days of receipt. The deadline for receipt of formal applications is 4:30 p.m., e.s.t., February 25, 2004, in order to be accepted for merit review and to permit timely consideration for award in Fiscal Year 2004.

ADDRESSES: All preapplications referencing Program Notice DE-FG0104ER04-03, should be sent

electronically to Dr. Thomas D. Ndousse, Mathematical, Informational, and Computational Sciences Division, Germantown Bldg./SC-31, Office of Science, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20858-1290. Email: tndousse@sc.doe.gov, Phone: 301-903-9960, Fax: 301-903-7774.

The preapplications should consist of two to three pages of narrative describing the research objectives and technical approach(es). Preapplications will be reviewed relative to the scope and research needs of the ASCR ultra high-speed networks for high-end scientific computing, as outlined in the summary paragraph and in the Supplementary Information. The preapplication should identify, on the cover sheet, the title of the project, the institution, principal investigator name, telephone, fax, and e-mail address. The focus element (SciDAC or MICS) for the preapplication should also be clearly identified. A response to each preapplication discussing the potential programmatic relevance of a formal application will be communicated to the Principal Investigator within 7 to 14 days of receipt.

Formal applications in response to this solicitation are to be electronically submitted by an authorized institutional business official through DOE's Industry Interactive Procurement System (IIPS) at: <http://e-center.doe.gov/>. IIPS provides for the posting of solicitations and receipt of applications in a paperless environment via the Internet. In order to submit applications through IIPS your business official will need to register at the IIPS website. It is suggested that this registration be completed several days prior to the date on which you plan to submit the formal application. The Office of Science will include attachments as part of this notice that provide the appropriate forms in PDF fillable format that are to be submitted through IIPS. IIPS offers the option of submitting multiple files—please limit submissions to only one file within the volume if possible, with a maximum of no more than four files. Color images should be submitted in IIPS as a separate file in PDF format and identified as such. These images should be kept to a minimum due to the limitations of reproducing them. They should be numbered and referred to in the body of the technical scientific proposal as Color image 1, Color image 2, etc. Questions regarding the operation of IIPS may be e-mailed to the IIPS Help Desk at: helpdesk@pr.doe.gov or you may call the help desk at: (800) 683-0751. Further information on the use of IIPS by the Office of Science is available

at: <http://www.sc.doe.gov/production/grants/grants.html>.

If you are unable to submit the application through IIPS, please contact the Grants and Contracts Division, Office of Science at: (301) 903-5212 or (301) 903-3604, in order to gain assistance for submission through IIPS or to receive special approval and instruction on how to submit printed applications.

SUPPLEMENTARY INFORMATION: Emerging large-scale experiments in many areas of science, such as high-energy physics, nuclear physics, climate modeling, biological sciences, etc., are anticipated to generate up to several Petabytes of data that will be transferred to geographically distant terascale computing facilities for analysis. The problems of efficient transfer of Petabyte-scale data, remote visualization of the resulting analysis, remote access to complex scientific instruments, and efficient large-scale scientific collaboration over today's networks all present serious technical challenges to networking and science communities. Addressing these challenges calls for a new generation of highly scalable transport mechanisms that can deliver and sustain multi-Gbps to high-end scientific applications; agile networking technologies that will make bandwidth on-demand possible; innovative scalable cyber security systems that operate efficiently and effectively at ultra high-speed (10 Gbps and beyond); intelligent network services that enable scientists to use network infrastructures with ease. These components are the critical building blocks of a new generation of ultra high-speed networks for DOE high-impact science applications.

The design of ultra high-speed networks that are effectively coupled distributed high-impact science applications is especially challenging because existing widely-deployed, low-speed network technologies do not perform well at ultra high-speeds. For example, transport protocols, such as the TCP and UDP stacks, intrusion detection systems, network interface cards, network measurement tools, firewalls, and the related middleware perform poorly at ultra high-speed.

Research is needed to enhance the performance of existing components and in some cases to develop radically new components that work effectively and efficiently at ultra high-speed. In addition, understanding how these components can be integrated to develop production-quality, ultra high-speed networks that can deliver end-to-end multi-Gigabits/sec to distributed

scientific applications is of significant importance.

These challenges will be addressed through an integrated program that emphasizes fundamental research and experimental network engineering activities designed to demonstrate the capabilities of ultra high-speed networks under realistic high-end computing scenarios for accelerated scientific discoveries. The integrated experimental network pilots will be supported under the SciDAC program while the fundamental networking research and development will be supported under the MICS program. More information on DOE networking requirements for distributed high-end application can be found in the following workshop reports:

(1) DOE Science Networking Challenges Workshop: Roadmap to 2008: <http://www.es.net/hypertext/welcome/pr/Roadmap/index.html>,

(2) Office of Science High-Performance Networking Planning Workshop, http://doecollaboratory.pnl.gov/meetings/hpnpw/finalreprot/high-impact_science.pdf,

(3) Ultra High-Speed Transport Protocols and Network Provisioning Workshop: <http://www.csm.ornl.gov/ghpn/wk2003>.

A. SciDAC Program: Integrated Experimental Ultra High-Speed Networks

Background

Beyond the scientific computing and computational science research embedded in DOE research programs, SC invests in a portfolio of coordinated research efforts directed at exploiting the emerging capabilities of terascale and petascale computing under the collective title of Scientific Discovery through Advanced Computing (SciDAC). The research projects in the SciDAC portfolio respond to the extraordinary difficulties of realizing sustained peak performance for those scientific applications that require terascale and petascale capabilities to accomplish their research goals. In recognition of these difficulties, the SciDAC research projects are collaborative efforts involving teams of physical scientists, mathematicians, computer scientists, and computational scientists working on major software and algorithm development for problems in the core research programs of SC. Research funded in the SciDAC portfolio must address the interdisciplinary problems inherent in ultra-scale computing, problems that cannot be addressed by a single

investigator or small group of investigators.

This element high performance networks, focuses on using the science applications in the SciDAC portfolio to test and validate the capabilities of ultra high-speed networks. This effort is designed to determine and demonstrate how ultra high-speed networks, high performance middleware, and high-end science applications can be seamlessly integrated to build a new generation network environment for accelerating scientific discoveries. All grant applications submitted under this element must have three distinct but integrated components: the DOE Science UltraNet test and/or the Energy Science Network (ESnet), a set of distributed high-end science SciDAC application prototypes, and a suite of high-performance middleware tools and services to efficiently couple the high-end science applications to the underlying network. In addition, projects in this effort must satisfy the following requirements:

- It must address ultra high-speed network capabilities and at least one or more science applications of national and international significance related to DOE's mission, and must have a high visibility.

- It must involve a distributed high-impact science applications, preferably previously funded SciDAC science applications. A complete description of the SciDAC program at: <http://www.osti.gov/scidac/>.

- High-performance middleware or grid technologies must be employed to couple the selected applications to the underlying high-speed network infrastructures.

- It is expected that projects must use the DOE Science UltraNet Testbed or segment of high-performance networks, such as ESnet with comparable capabilities. Detailed information on the DOE Science UltraNet testbed can be obtained at: <http://www.csm.ornl.gov/ultranet>, and that of ESnet at: <http://www.es.net>.

Specific network capabilities to be demonstrated in these experimental network pilot projects may include but are not limited to the following:

- Petabyte-scale data distribution engineering—ultra high-speed data transfers over very long distances using enhanced TCP and non-TCP protocols, SANs over wide-area networks, network data caching, and dynamic network provisioning network technology for on-demand data transfers, etc. This effort must include appropriate high-impact science applications areas with significant needs for very high-speed data transfers.

- Network monitoring infrastructure—a collection of scalable network monitoring platforms, strategically located at impact science sites and in peering points. This infrastructure must enable national and international researchers to monitor the end-end performance of networks, diagnose faults, and predict network performance at various layers of abstraction including the application layer. The target network environment for this infrastructure should be the DOE UltraNet testbed and/or a segment of the Energy Sciences Network (ESnet) which operates 10 Gbps and above.

- Cyber Security Infrastructure for open science Communities—a comprehensive cyber security infrastructure for a community of scientists that will enable them to collaborate and share distributed resources securely. The target science community must have well-defined shared resources and a collection of appropriate middleware services and policies to share them.

It is recommended that target science applications and tools selected for the above project be selected from current SciDAC projects or projects that are consistent with its vision. A complete list of funded SciDAC projects can be found at: <http://www.osti.gov/scidac/projects>.

B. MICS—Base Program: Ultra High-Speed Network Engineering

The MICS aspect of this solicitation deals with research and development of ultra high-speed network technologies on a longer time horizon. It focuses primarily on deployable network transport protocols, advanced end-to-end network services, network-aware middleware, and end-to-end dynamics provisioning technologies, all of which must operate efficiently at ultra high-speed (10 Gbps and beyond). The specific technologies of current interest include but are not limited to the following:

- Ultra high-speed transport protocols scalable transport protocol—stacks that deliver and sustain multi-Gigabits/second to high-end applications efficiently on dedicated or shared single/multiple ultra high-speed channels. Such protocols could involve the extension of the existing TCP stacks or radical new non-TCP/IP approaches that could interoperate with existing network infrastructures.

- Dynamic provisioning technologies—agile network technologies to provide on-demand optical channels, wavelength scheduling, wavelength sharing, coarse-grain QOS to diverse science

communities. In addition, such technologies must provide the capability to establish packet-switched, circuit-switched, or hybrid optical paths dynamically from a pool of wavelengths.

- Ultra high-speed cyber security systems—scalable cyber security systems, such as firewalls, intrusion detection systems, authentication/authorizations systems, and related services that operate efficiently at ultra high-speed.

- Ultra high-speed network measurement and analysis—efficient tools and techniques for diagnosing, end-to-end performance prediction of ultra high-speed network.

Applicants are encouraged to refer to the final report of the DOE Science Networking Challenge: Roadmap to 2008 found at: <http://www.osti.gov/scidac/projects.html> for additional information on SC networking requirements.

Collaboration

Applicants are encouraged to collaborate with researchers in other institutions, such as: universities, industry, non-profit organizations, federal laboratories and Federally Funded Research and Development Centers (FFRDCs), including the DOE National Laboratories, where appropriate, and to include cost sharing wherever feasible. Additional information on collaboration is available in the Application Guide for the Office of Science Financial Assistance Program that is available via the Internet at: <http://www.sc.doe.gov/production/grants/Colab.html>.

Program Funding

It is anticipated that up to \$5 million will be available for SciDAC and MICS Programs; up to six to ten awards are anticipated, contingent on availability of appropriated funds in Fiscal Year 2004 and the size of the awards. Multiple year funding is expected, also contingent on availability of funds and progress of the research.

Awards are expected to be at most \$1.2 million per year for experimental ultra high-speed network research projects. Awards for integrated experimental ultra high-speed networks research projects are expected to be at most \$1.2 million per year. Since integrated experimental networking projects are expected to be multi-institution and multi-disciplinary projects, awards under this notice would range from \$150,000 to \$500,000 for participation in an experimental networks project per participating project. Awards for ultra high-speed

networking engineering will range from \$150,000 to \$300,000 per year for each single investigator. The funding period for all projects will range from two to three years subject to availability of funds. Grant applications funded under these programs will be handled as cooperative agreements.

Merit Review

Applications will be subjected to scientific merit review (peer review) and will be evaluated against the following evaluation criteria, which are listed in descending order of importance codified at 10 CFR 605.10(d):

- (1) Scientific and/or Technical Merit of the Project,

- (2) Appropriateness of the Proposed Method or Approach,

- (3) Competency of Applicant's Personnel and Adequacy of Proposed Resources,

- (4) Reasonableness and Appropriateness of the Proposed Budget.

The evaluation under item 1, Scientific and/or Technical Merit of the Project, will also consider the following elements:

- (a) The potential of the proposed project to make a significant impact to distributed Petabytes-scale distributed data archives and other high-end science applications.

- (b) The extent to which the results of the project are extensible operational production high-performance networks, such as ESnet.

- (c) The degree ultra high-speed networking technologies can inter-operate with existing networking technologies.

The evaluation under item 2, Appropriateness of the Proposed Method or Approach, will also consider the following elements:

- (a) The degree to which the project adheres to the management philosophy of incorporating science applications into the project execution.

- (b) The quality of the plan for ensuring interoperability and integration with related network environment software produced by other MICS and SciDAC efforts.

- (c) The extent to which the project incorporates broad community (industry/academia/other federal programs) interaction.

- (d) Quality and clarity of proposed work schedule and deliverables.

- (e) Use of recent advances in optical network technologies, such as GMPLS to support distributed high-end applications.

The evaluation will include program policy factors, such as the relevance of the proposed research to the terms of

the announcement and the agency's programmatic needs. Note: External peer reviewers are selected with regard to both their scientific expertise and the absence of conflict-of-interest issues. Non-federal reviewers will often be used, and submission of an application constitutes agreement that this is acceptable to the investigator(s) and the submitting institution.

Submission Information

The Project Description must be 20 pages or less, exclusive of attachments. It must contain an abstract or project summary on a separate page with the name of the applicant, mailing address, phone, FAX and email listed. The application must include letters of intent from collaborators (briefly describing the intended contribution of each to the research), and short curriculum vitae for the applicant and any co-PIs.

Applicants must disclose all information on their current and pending grants. To provide a consistent format for the submission, review and solicitation of grant applications submitted under this notice, the preparation and submission of grant applications must follow the guidelines given in the Application Guide for the Office of Science Financial Assistance Program, 10 CFR Part 605. Access to SC's Financial Assistance Application Guide is possible via the World Wide Web at: <http://www.science.doe.gov/production/grants/grants.html>. DOE is under no obligation to pay for any costs associated with the preparation or submission of applications if an award is not made.

The Catalog of Federal Domestic Assistance number for this program is 81.049, and the solicitation control number is ERFAP 10 CFR Part 605.

Issued in Washington, DC on November 3, 2003.

John Rodney Clark,

Associate Director of Science for Resource Management.

[FR Doc. 03-28315 Filed 11-10-03; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

International Energy Agency Meeting

Notice of Meeting

AGENCY: Department of Energy.

ACTION: Notice of meeting.

SUMMARY: The Industry Advisory Board to the International Energy Agency (IEA) will meet on November 19, 2003, at the headquarters of the IEA in Paris, France in connection with a meeting of the

IEA's Standing Group on Emergency Questions.

FOR FURTHER INFORMATION CONTACT:

Samuel M. Bradley, Assistant General Counsel for International and National Security Programs, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, 202-586-6738.

SUPPLEMENTARY INFORMATION:

In accordance with section 252(c)(1)(A)(i) of the Energy Policy and Conservation Act (42 U.S.C. 6272(c)(1)(A)(i)) (EPCA), the following notice of meeting is provided:

A meeting of the Industry Advisory Board (IAB) to the International Energy Agency (IEA) will be held at the headquarters of the IEA, 9, rue de la Fédération, Paris, France, on November 19, 2003, beginning at 2 p.m. The purpose of this notice is to permit attendance by representatives of U.S. company members of the IAB at a meeting of the IEA's Standing Group on Emergency Questions (SEQ), which is scheduled to be held at the IEA on November 19, beginning at 3 p.m. and continuing on November 20, beginning at 9:30 a.m., including a preparatory encounter among company representatives from approximately 2 p.m. to 3 p.m. on November 19.

The agenda for the preparatory encounter among company representatives is a review of the SEQ's meeting agenda. The agenda of the SEQ meeting is under the control of the SEQ. It is expected that the SEQ will adopt the following agenda:

1. Adoption of the Agenda
2. Approval of the Summary Record of the 108th Meeting
3. Program of Work 2003–2004
 - Review of SEQ Activities 2003–2004
 - Projects for Surplus Publication Revenues
 - First Steps Toward Emergency Response Exercise 3
4. Update on Compliance with International Energy Program Stockholding Commitments
 - Reports by Non-Complying Member Countries
5. The Current Oil Market Situation
6. Report on the IEA Berlin Seminar on Oil Stocks and New Challenges to the Oil Market
7. Oil Stocks and the Oil Market
8. Report on Current Activities of the IAB
9. Other Policy and Legislative Developments in Member Countries
10. Other Emergency Response Activities
11. Recent Oil Developments in Iraq

12. World Energy Investment Outlook to 2030: Key Trends and Uncertainties
13. Activities with Non-Member Countries and International Organizations
 - Workshop on ASEAN Oil Security and Emergency Preparedness
 - Joint Oil Data Initiative (JODI), Cairo, October 8–9, 2003
 - Trends and the IEA Role in Emergency Stockholding in Non-Member Countries
 - Stockbuilding Workshop in India, January 20, 2004
 - IEA and EU Stockholding Obligations
14. Emergency Response Reviews of IEA Member and Candidate Countries
 - Revised Schedule of Emergency Response Reviews for 2003–2004
15. Other Documents for Information
 - Emergency Reserve Situation of IEA Member Countries on July 1, 2003
 - Emergency Reserve Situation of IEA Candidate Countries on July 1, 2003
 - Monthly Oil Statistics: August 2003
 - Base Period Final Consumption: 3Q2002–1Q2003
 - Quarterly Oil Forecast: 4Q2003
 - Panel of Arbitrators: Korean representation
 - Update of Emergency Contacts List
16. Other Business
 - Dates of Next Meetings: March 16–18, 2004, June 23–24, 2004, October 25–29, 2004

As provided in section 252(c)(1)(A)(ii) of the Energy Policy and Conservation Act (42 U.S.C. 6272(c)(1)(A)(ii)), this meeting is open only to representatives of members of the IAB and their counsel; representatives of members of the SEQ; representatives of the Departments of Energy, Justice, and State, the Federal Trade Commission, the General Accounting Office, Committees of Congress, the IEA, and the European Commission; and invitees of the IAB, the SEQ, or the IEA.

Issued in Washington, DC, November 4, 2003.

Samuel M. Bradley,

Assistant General Counsel for International and National Security Programs.

[FR Doc. 03–28317 Filed 11–10–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Proposed Procedures for Distribution of Remaining Crude Oil Overcharge Refunds

AGENCY: Office of Hearings and Appeals, Department of Energy.

ACTION: Notice of proposed procedures for distribution of remaining crude oil

overcharge refunds and opportunity for comment.

SUMMARY: The Department of Energy (DOE) Office of Hearings and Appeals (OHA) announces, in this notice, proposed procedures for making the final round of payments to successful claimants in the crude oil overcharge refund proceeding. In May 2003, the United States District Court for the District of Columbia issued a decision in *Consolidated Edison Company of New York v. Abraham*, No. CIV.A.1:01CV00548 (D.D.C. May 9, 2003) (Westlaw, 2003 WL 21692698), *appeal docketed*, No. 03–1498 (Fed. Cir.), which, *inter alia*, rendered a declaratory judgment that successful claimants are entitled to a distribution of the entire remaining amount of crude oil overcharges reserved for direct restitution, “insofar as practicable.” OHA will therefore make a final distribution in the long-standing crude oil refund proceeding.

DATES: Comments may be filed by January 12, 2004.

ADDRESSES: Comments should be addressed to: Crude Oil Refund Proceeding, Office of Hearings and Appeals, Department of Energy, Washington, DC 20585–1615, and submitted electronically to crudeoilrefunds@hq.doe.gov.

FOR FURTHER INFORMATION CONTACT:

Tami L. Kelly, Secretary, or Thomas O. Mann, Deputy Director, Office of Hearings and Appeals, Department of Energy; telephone: 202–287–1449, e-mail: tami.kelly@hq.doe.gov, thomas.mann@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Over two decades ago—during the period August 1973 through January 1981—federal regulations governed the pricing and allocation of domestic crude oil and refined petroleum product (“the controls period”). During this controls period and for some time afterwards, DOE took enforcement actions against firms for violating those regulations. As a result of those actions, firms in the petroleum industry remitted several billion dollars in crude oil overcharges to DOE.

The largest court proceeding involving crude oil overcharges was multidistrict litigation over the pricing of crude oil produced from low-output “stripper wells.” Once the existence of overcharges was established, a federal district court considered the issue of how those funds should be distributed in order to make restitution to injured parties. *In Re The Department of Energy*

Stripper Well Exemption Litigation, 578 F. Supp. 586 (D. Kan. 1983). Groups at each level of distribution claimed they were injured by the overcharges, including refiners, resellers, retailers, larger consumers, and state governments representing their citizens. The court referred the issue of who was injured by crude oil overcharges and in what amount to OHA, which conducted hearings and issued a report. *OHA Report on Stripper Well Oil Overcharges*, 6 CCH Fed. Energy Guidelines ¶ 90,507.

In 1986, the Stripper Well litigation was settled by an agreement that provided for the distribution of existing crude oil overcharge funds, as well as those received in the future. *Stripper Well Settlement Agreement*, 6 CCH Fed. Energy Guidelines ¶ 90,649. The court approved the settlement agreement, *In Re Stripper Well Exemption Litigation*, 653 F. Supp. 108 (D. Kan. 1986), and DOE issued a Modified Statement of Restitutionary Policy to authorize the distribution of these refunds. *Statement of Modified Restitutionary Policy in Crude Oil Cases*, 51 FR 27899 (1986). Congress, in subsequent legislation concerning refunds, expressly recognized the agreement and excluded from the legislation funds subject to the agreement. *Petroleum Overcharge Distribution and Restitution Act of 1986* ("PODRA"), 15 U.S.C. 4502(a)(2).

The agreement divided the crude oil overcharge funds among escrows established for various types of claimants as well as the States and Federal Government. By choosing to receive a refund from one of the escrows, a claimant became a party to the agreement, and waived the right to request any future crude oil overcharge refunds. The agreement included escrows for various types of end-user claimants. Over 2,000 firms received refunds from those escrows and waived the right to future crude oil overcharge refunds.

The agreement provided that OHA could initially reserve up to 20 percent of the crude oil overcharge funds for refunds to claimants who demonstrated injury under DOE procedural regulations in 10 CFR part 205, subpart V. *Agreement § IV.B.6*, 6 Fed. Energy Guidelines at 90,664–65. The agreement provided that the remaining amount (at least 80 percent of the total funds) would be divided equally between the States and DOE for indirect restitution. The agreement further provided that if OHA did not refund all of the amount in the initial reserve, the balance of the reserve would be divided equally between the States and DOE for indirect restitution. Finally, the agreement

provided that the States must use the funds to make indirect restitution through programs designed to benefit injured consumers of refined petroleum products, including programs: (1) Approved by OHA, (2) listed in a 1981 DOE consent order, or (3) set forth in specified energy conservation statutes.

During the period 1987 through 1995, non-waiving injured parties were allowed to file crude oil overcharge refund applications with OHA. *Notice Explaining Procedures for Processing Refund Applications in Crude Oil Refund Proceedings Under 10 CFR part 205, subpart V*, 52 FR 11737; 7 DOE (CCH) ¶ 90,512 (April 10, 1987) ("the 1987 Notice"). Even as OHA processed these applications, DOE continued to collect crude oil overcharge funds and refer them to OHA for distribution. Each time OHA received crude oil overcharge funds for distribution, we issued an order providing for an initial reserve of 20 percent of the funds for refund claimants, which was held in a claimants' account. *See, e.g., OXY USA, Inc.*, 25 DOE ¶ 85,087 (1996). OHA ordered that the remaining 80 percent of the funds be deposited in equal shares in a States' account and a DOE account, and OHA periodically directed the transfer of funds to the States for indirect restitution. *See, e.g., State Escrow Distribution*, 6 Fed. Energy Guidelines ¶ 85,001 (2000). Over the last 16 years, OHA has refunded more than \$600 million in direct restitution to 86,000 successful claimants through the Subpart V process. The total volume of petroleum products which formed the basis for these refunds approaches 400 billion gallons, approximately 20 percent of the total 2,020,997,335,000 gallons of refined petroleum products consumed in the United States during the controls period (August 22, 1973 through January 21, 1981).

The successful claimants were almost exclusively end-users and are quite diverse. They include utilities and cooperatives; federal, state and local governmental entities that purchased petroleum products for their operations; transportation companies (air, water, rail, and truck); manufacturers; and farmers. The following entities comprise approximately 50 percent of the total approved volume: utilities and cooperatives (29 percent); the Defense Logistics Agency (a federal government agency) (11 percent); state and local governments (6 percent); and foreign companies (about 4 percent).

During the first "round" of crude oil refunds, OHA paid successful claimants at a volumetric refund amount of \$.0002 per gallon of petroleum products purchased. OHA subsequently raised

the volumetric twice. In 1989, OHA increased the cumulative volumetric to \$.0008 per gallon, and issued supplemental refund checks to successful claimants who had been paid the lower \$.0002 rate. *See Crude Oil Supplemental Refund Distribution*, 18 DOE ¶ 85,878 (1989). In 1995, OHA raised the cumulative volumetric to \$.0016 per gallon, and notified successful claimants that had been paid at the lower rate that they could file for a supplemental refund.

During the 1989 round of supplemental refunds, a significant number of checks issued to successful claimants were returned uncashed to OHA. OHA found that many successful claimants had undergone changes in address, and failed to inform OHA of their address changes, as required by the terms of the orders granting their original refunds. When checks were returned, OHA was able to get new mailing addresses for many of these successful claimants and issue new checks to them, but this task consumed considerable time and resources to accomplish.

In 1995, OHA did not approve the immediate mailing of supplemental refund checks as it had in 1989, based on the difficulties we experienced during the 1989 round. *Issuance of Supplemental Refund Checks in Special Refund Proceeding Involving Crude Oil Overcharge Refunds*, 60 FR 15562 (1995). Instead, OHA notified successful claimants (by mailing notice to the address listed in the database) that they could file for the supplemental refund. In addition, OHA elected not to give direct notice to the 21,000 successful claimants whose refunds were \$50 or less. OHA concluded that the cost and administrative burden of mailing was not justified given the small amount of the refunds and likely changes in status and address. Nevertheless, all successful claimants were able to request and receive supplemental refunds. OHA's processing of the requests also confirmed that many successful applicants had undergone changes in status that affected their right to receive a supplemental refund. Examples of changes in status that might affect the right to a refund included the acquisition, sale, or liquidation of business entities, the merger or creation of school districts, and the divorce or death of individuals.

In 1999, OHA set a January 2000 deadline for successful claimants to request the supplemental refund payment authorized in 1995. *Announcement of Final Deadline to Request Supplemental Payment*, 64 FR 19998 (1999). The deadline did not

apply to small claimants, so they have been eligible to date to request a supplemental refund up to the cumulative \$.0016 volumetric amount. OHA has now completed processing all original crude oil overcharge refund applications and all pending requests for the 1995 supplemental payment. With the completion of all original and supplemental refund requests, approximately \$262 million will remain in the reserve for refund claimants. OHA does not expect to receive any significant additional crude oil overcharge funds.

In May 2003, the United States District Court for the District of Columbia issued a declaratory judgment in *Consolidated Edison Company of New York v. Abraham*, *supra*, which led OHA to establish procedures for making a final distribution of the entire amount remaining in the 20 percent reserve for successful crude oil refund claimants, "insofar as practicable." Slip. op. at 14.

The volumetric amount for the final crude oil refund payment will be calculated by dividing the entire amount remaining in the claimants' reserve, approximately \$262 million ("the numerator"), by the total number of gallons purchased by successful claimants, approximately 390 billion gallons ("the denominator"), yielding a volumetric of \$.00067. This method of calculating the volumetric refund is consistent with OHA's historic practice in the 1995 supplemental refund, and it is intended to distribute the entire amount remaining in the 20 percent reserve for successful crude oil refund claimants, "insofar as practicable," as envisioned by the court in *Consolidated Edison Company of New York v. Abraham*, *supra*.

When the initial volumetric refund amount was set in the 1987 Notice, OHA used the "full parity" method to place claimants seeking refunds under Subpart V on a par with the parties who could get immediate refunds under one of the several escrows established under the Stripper Well settlement agreement. *Notice Explaining Procedures for Processing Refund Applications in Crude Oil Refund Proceedings Under 10 CFR part 205, subpart V, supra*. To get an immediate refund from a Stripper Well escrow, a claimant had to waive the right to future refunds under subpart V. As explained in the 1987 Notice, the full parity method counted in the numerator of the volumetric calculation a portion of the moneys in the Stripper Well litigation, even though that amount of overcharges was not yet available for distribution to subpart V claimants as part of the 20 percent reserve. This reflected DOE's estimate that substantial

additional crude oil overcharges would be collected in future settlements, and gave potential claimants a more realistic idea of the refunds they could expect to receive under Subpart V.

OHA has consistently adhered to the principle established in the Stripper Well settlement agreement, the Modified Statement of Restitutionary Policy, and the 1987 Notice, that the volumetric refunds actually paid to successful claimants were limited by the 20 percent ceiling placed on the claimants' reserve. Thus, while the 1987 Notice established the initial volumetric refund at \$.0008, successful claimants were paid at the rate of \$.0002 per gallon until that amount could be increased by \$.0006 per gallon in 1989, as additional crude oil overcharges were collected by DOE, to reach the cumulative refund amount of \$.0008. For the supplemental refund payment authorized by OHA in 1995, the volumetric was calculated by dividing the dollar amount of crude oil overcharges in the 20 percent reserve then available for distribution by the approved gallons of refined petroleum products purchased by successful claimants in the United States during the controls period. This resulted in the total cumulative refund amount of \$.0016 per gallon paid to date. With the final distribution proposed in this Notice, the cumulative refund amount will increase to \$.00227 per gallon.

OHA will try to distribute the entire amount of the 20 percent reserve. However, since not every successful applicant will apply for this final refund payment, some money will remain undistributed. Under the Stripper Well settlement agreement, any amount that remains in the claimants' account at the conclusion of this final round of crude oil refunds should be divided evenly between the States and the Federal Government for indirect restitution.

II. Proposed Procedure for Final Distribution of Crude Oil Refunds

In deciding how to make the final crude oil refund distribution, OHA's experience gained during the past 16 years will be invaluable. For example, OHA will mail notice of the final refund distribution to successful claimants, and we intend to use the extensive database developed during the crude oil refund proceeding as the basis for the initial mailing. However, some changes are warranted in the process OHA will use for this final refund distribution. Eight years have passed since 1995 when the second round of supplemental refunds was authorized. The passage of additional time means that successful claimants have undergone even more

changes in status and address than we encountered in the two prior rounds of supplemental refunds. Although OHA decisions granting refunds ordered successful claimants to report address changes to OHA, experience teaches that many have not, and the information in our database, although the best available, has become somewhat outdated. We need to verify the information about status and address before disbursing final refunds to individual claimants.

Fortunately, information technology, particularly the Internet and the World Wide Web, is now available to a greater number of claimants since OHA last made supplemental crude oil refund payments in 1995. Thus OHA proposes to augment the normal paper application process by developing an online application system that will make it easier for many claimants to request a final supplemental crude oil refund payment. OHA will use appropriate safeguards to prevent fraud. Filing services represented many successful claimants in the crude oil refund proceeding. In addition to notifying claimants, OHA will mail notice to the filing services at the commencement of the final crude oil refund distribution. For simplicity, final refund checks will be made payable to, and mailed to, the applicant.

OHA will follow the practice used for distributing the 1995 supplemental crude oil refund, and not give direct notice to the smallest successful claimants. In 1995, we did not mail notice to claimants whose supplemental refund payments would be less than \$50. For the final crude oil refund, we will not mail notice to claimants whose final payments would be less than \$250. We continue to believe that the cost and administrative burden of mailing information to these claimants is not justified given the small amount of the refunds. As with the 1995 supplemental refund payment, however, we will accept applications from all successful claimants, as long as they are filed within the 180-day application period. Section 205.286(b) of the subpart V regulations states that OHA may decline to consider applications for refund amounts that are too small to warrant individual consideration, in view of the costs involved. Although OHA never established a floor amount for crude oil refunds, in refund cases involving overcharges on refined petroleum products OHA conducted under PODRA, it was standard practice to exclude small claims altogether. *Cf. Exxon Corp.*, 17 DOE ¶85,590 (1988). In our view, the proposed treatment of smaller claimants in the final

distribution of crude oil refunds represents a reasonable compromise between costs to the government and potential benefits to the claimants.

Additional limitations will be necessary in the final round of crude oil refunds. All successful claimants have already had extensive opportunities over many years to establish their respective purchase volumes of refined petroleum products, which form the bases for their respective refunds. There will be no further opportunities to revise volumes during the final distribution. Furthermore, the period within which to apply for the final round of refund payments will be strictly limited to 180 days. No extensions of time will be granted, and no late applications will be accepted. No new applications will be accepted—the final crude oil refund payment is available only to successful claimants. After 16 years, it is important to bring this proceeding to a conclusion.

OHA seeks comments on these proposed procedures. Interested parties should send comments to the address shown on the present Notice. After OHA considers the comments received, we will issue a final Notice that will explain how successful claimants can apply for a final crude oil refund payment. The final Notice will be published in the **Federal Register**, and it will be available on the OHA Web site, <http://www.oha.doe.gov/>.

Issued in Washington, DC on November 5, 2003.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 03-28316 Filed 11-10-03; 8:45 am]

BILLING CODE 6450-01-P

ENVIRONMENTAL PROTECTION AGENCY

[OPP-2003-0359; FRL-7333-5]

Ace Info Solutions, Inc. and AMS; Transfer of Data

AGENCY: Environmental Protection Agency(EPA).

ACTION: Notice.

SUMMARY: This notice announces that pesticide related information submitted to EPA's Office of Pesticide Programs (OPP) pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA), including information that may have been claimed as Confidential Business Information (CBI) by the submitter, will be transferred to Ace Info Solutions, Inc., and its subcontractor, AMS, in

accordance with 40 CFR 2.307(h)(3) and 2.308(i)(2). Ace Info Solutions, Inc., and its subcontractor, AMS, have been awarded a contract to perform work for OPP, and access to this information will enable Ace Info Solutions, Inc., and its subcontractor, AMS, to fulfill the obligations of the contract.

DATES: Ace Info Solutions, Inc., and its subcontractor, AMS, will be given access to this information on or before November 17, 2003.

FOR FURTHER INFORMATION CONTACT: Erik R. Johnson, FIFRA Security Officer, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 305-7248; e-mail address: johnson.erik@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action applies to the public in general. As such, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP-2003-0359. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305-5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the public docket is available through EPA's

electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

II. Contractor Requirements

Under Contract No. 68-W-03-050, Ace Info Solutions, Inc., and its subcontractor, AMS, will perform ongoing maintenance for Lotus Notes and Domino production applications. Duties include regular and ongoing:

- Responses to automated reports of errors to correct systemic design flaws which make an application inconsistent with organizational "look and feel" standards.
- Responses to written requests by the Work Assignment Manager.
- Technical advice.
- Update of existing documentation (most notably operational code) must be clearly and thoroughly documented.
- Develop a "look and feel" (user interface) standard for all OPP applications.

The OPP has determined that access by Ace Info Solutions, Inc., and its subcontractor, AMS, to information on all pesticide chemicals is necessary for the performance of this contract.

Some of this information may be entitled to confidential treatment. The information has been submitted to EPA under sections 3, 4, 6, and 7 of FIFRA, and under sections 408 and 409 of FFDCA.

In accordance with the requirements of 40 CFR 2.307(h)(2), the contract with Ace Info Solutions, Inc., and its subcontractor, AMS, prohibits use of the information for any purpose not specified in the contract; prohibits disclosure of the information to a third party without prior written approval from the Agency; and requires that each official and employee of the contractor sign an agreement to protect the information from unauthorized release and to handle it in accordance with the *FIFRA Information Security Manual*. In addition, Ace Info Solutions, Inc., and its subcontractor, AMS, are required to submit for EPA approval a security plan under which any CBI will be secured and protected against unauthorized release or compromise. No information will be provided to Ace Info Solutions,

Inc., and its subcontractor, AMS, until the requirements in this document have been fully satisfied. Records of information provided to Ace Info Solutions, Inc., and its subcontractor, AMS, will be maintained by EPA Project Officers for this contract. All information supplied to Ace Info Solutions, Inc., and its subcontractor, AMS, by EPA for use in connection with this contract will be returned to EPA when Ace Info Solutions, Inc., and its subcontractor, AMS, have completed their work.

List of Subjects

Environmental protection, Business and industry, Government contracts, Government property, Security measures.

Dated: October 30, 2003.

Arnold E. Layne,

Director, Information Resources and Services Division, Office of Pesticide Programs.

[FR Doc. 03-28108 Filed 11-10-03; 8:45 am]

BILLING CODE 6560-50-S

ENVIRONMENTAL PROTECTION AGENCY

[OPP-2002-0039; FRL-7333-4]

Cyprodinil; Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket identification (ID) number OPP-2002-0039, must be received on or before December 12, 2003.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Shaja R. Brothers, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308-3194; e-mail address: brothers.shaja@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP-2002-0039. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305-5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through EPA's Internet under the "**Federal Register**" listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to submit or view public comments, access the index listing of the contents of the official public docket, and to

access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

Certain types of information will not be placed in EPA's Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a

brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at <http://www.epa.gov/edocket>, and follow the online instructions for submitting comments. Once in the system, select "search," and then key in docket ID number OPP-2002-0039. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to opp-docket@epa.gov, Attention: Docket ID Number OPP-2002-0039. In contrast to EPA's

electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001, Attention: Docket ID Number OPP-2002-0039.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP-2002-0039. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be

included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Make sure to submit your comments by the deadline in this notice.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 4, 2003.

Debra Edwards,

Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner summary of the pesticide petition is printed below as required by FFDCA section 408(d)(3). The summary of the petition was

prepared by the petitioner and represents the view of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Interregional Research Project Number 4 (IR-4)

PP 8E5012

EPA has received a pesticide petition (8E5012) from IR-4, 681 U.S. Highway #1 South, North Brunswick, NJ 08902 proposing, pursuant to section 408(d) of the FFDCFA, 21 U.S.C. 346a(d), to amend 40 CFR 180.532 by extending the time-limited tolerance to December 31, 2004, for residues of cyprodinil, 4-cyclopropyl-6-methyl-N-phenyl-2-pyrimidinamine in or on the raw agricultural commodities onion, dry bulb at 0.60 part per million (ppm); onion, green at 4.0 ppm; and strawberry at 5.0 ppm. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCFA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition. Syngenta Crop Protection, Inc., Greensboro, NC 27409 is the manufacturer of the chemical pesticide, cyprodinil. Syngenta Crop Protection, Inc., prepared and submitted the following summary of information, data, and arguments in support of the pesticide petitions. This summary does not necessarily reflect the findings of EPA.

A. Residue Chemistry

1. *Plant metabolism.* The metabolism of cyprodinil is adequately understood for the purpose of the proposed tolerances.

2. *Analytical method.* Syngenta has developed and validated analytical methodology for enforcement purposes. This method (Syngenta Crop Protection, Inc., Method AG-631B) has passed the Agency petition method validation for several commodities and is currently the enforcement method for cyprodinil. An extensive data base of method validation data using this method on various crop commodities is available.

3. *Magnitude of residues.* Complete residue data to support the requested tolerances for strawberry, onion, dry bulb, and onion, green have been submitted. The requested tolerances are adequately supported.

B. Toxicological Profile

An assessment of toxic effects caused by cyprodinil is discussed in Unit III.A. and Unit III.B. of the **Federal Register** dated June 22, 2001 (66 FR 33478) (FRL-6778-1).

1. *Animal metabolism.* The metabolism of cyprodinil in rats is adequately understood.

2. *Metabolite toxicology.* The residues of concern for tolerance setting purposes is the parent compound. Based on structural similarities to genotoxic nucleotide analogs, there was concern that the pyrimidine metabolites (CGA-249287, NOA-422054) may be more toxic than the parent compound. However, EPA's review indicates similar results in an acute oral and mutagenicity studies with both the parent compound and the CGA-249287 metabolite. EPA concluded that the toxicity of the CGA-249287 and NOA-422054 metabolites is no greater than that of the parent, conditional on submission and review of confirmatory data of an acute oral toxicity study and bacterial reverse mutation assay for the NOA-422054 metabolite. Although the metabolites CGA-232449 and CGA-263208 were determined to be of potential toxicological concern, they are not expected to be more toxic than cyprodinil *per se*.

3. *Endocrine disruption.* Cyprodinil does not belong to a class of chemicals known or suspected of having adverse effects on the endocrine system. Developmental toxicity studies in rats and rabbits and a reproduction study in rats gave no indication that cyprodinil might have any effects on endocrine function related to development and reproduction. The chronic studies also showed no evidence of a long-term effect related to the endocrine system.

C. Aggregate Exposure

1. *Dietary exposure.* A Tier III acute and chronic dietary exposure evaluation was made using the Dietary Exposure Evaluation Model (DEEM™), version 7.76 from Exponent. Empirically derived processing studies for apple juice (0.39X), apple pomace (5.22X), grape juice (0.29X), dried prunes (2.05X), and lychee fruit peeling factor (0.0092X) were used in these assessments. The apple juice processing factor was used as a surrogate for pear juice and all other processing factors used DEEM™ defaults. All consumption data for these assessments were taken from the United States Department of Agriculture (USDA) Continuing Survey of Food Intake by Individuals (CSFII) with the 1994-1996 consumption database and the

Supplemental CSFII children's survey (1998) consumption database. These exposure assessments included all registered uses and pending uses on watercress, bushberries, caneberries, juneberries, ligonberries, pistachios, salal. A notice of filing for the pending uses was published in the **Federal Register** of May 1, 2002 (67 FR 21671) (FRL-6833-4). In addition to the registered and pending uses, this notice of filing includes exposure assessments for: Brassica, head and stem (Subgroup 5A), Brassica, leafy greens (Subgroup 5B), turnip, greens, carrot, herbs (Subgroup 19A), lychee, longan, and Spanish lime. Secondary residues in animal commodities were estimated based on theoretical worst-case, yet nutritionally adequate animal diets and transfer information from feeding studies.

i. *Food.* For the purposes of assessing the potential dietary exposure under the proposed tolerances, Syngenta Crop Protection, Inc., has estimated aggregate exposure from all crops for which tolerances are established or proposed. These assessments utilized residue data from field trials where cyprodinil was applied at the maximum intended use rate and samples were harvested at the minimum pre-harvest interval (PHI) to obtain maximum residues. Percent of crop treated values were estimated based upon economic, pest, and competitive pressures. The values used in these assessments were: Almonds, pome fruits, stone fruits, and grapes 100%; onions 9%; strawberries 42%; watercress 95%; berries 13%; pistachios, herbs 80%; crop group 5A and 5B, carrots, turnip, greens, lychee, longan, and Spanish lime 10%.

ii. *Acute exposure.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. EPA has not conducted an acute dietary risk assessment since no toxicological endpoint of concern was identified during the review of the available data.

iii. *Chronic exposure.* The cyprodinil Tier III chronic dietary exposure assessment was based upon residue field trial results. For the purpose of aggregate risk assessment, the exposure values were expressed in terms of margin of exposure (MOE) which was calculated by dividing the no observable adverse effect level (NOAEL) by the exposure for each population subgroup. In addition, exposure was expressed as a percent of the reference dose (RfD). Chronic exposure to the most exposed subpopulation (children 1 and 2 years old) resulted in a MOE of 1,203 (7.48%

of the chronic RfD of 0.03 milligram/kilogram body weight/day (mg/kg bwt/day). Since the benchmark MOE for this assessment was 100 and since EPA generally has no concern for exposures below 100% of the RfD, Syngenta Crop Protection, Inc., believes that there is a reasonable certainty that no harm will result from dietary (food) exposure to residues arising from the current and proposed uses for cyprodinil.

iv. *Drinking water.* The degradation of cyprodinil is microbially mediated with an aerobic soil metabolism half-life of less than 46 days. Cyprodinil Koc's vary from 1,550 to 2,030 and cyprodinil exhibits a strong binding affinity for soil. Cyprodinil is stable to hydrolysis but degrades rapidly under photolytic conditions.

Estimated Environmental Concentrations (EECs) of cyprodinil in drinking water were determined by EPA. EPA Screening Concentration in Groundwater (SCI-GROW) model was used to determine acute and chronic EECs in ground water and the Agency's surface water model Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) was used to determine acute and chronic EECs in surface water. Based on the model outputs, the EECs of cyprodinil are 0.04 part per billion (ppb) for acute and chronic exposure to ground water and 32 ppb and 6 ppb for acute and chronic exposure, respectively, to surface water.

2. *Non-dietary exposure.* There is a potential residential post-application exposure to adults and children entering residential areas treated with cyprodinil. Since the Agency did not select a short-term endpoint for dermal exposure, only intermediate dermal exposures were considered. Based on the residential use pattern, no long-term post-application residential exposure is expected.

3. *Chronic aggregate exposure.* Based on the completeness and reliability of the toxicity data supporting these petitions, Syngenta Crop Protection, Inc., believes that there is a reasonable certainty that no harm will result from aggregate exposure to residues arising from all current and proposed cyprodinil uses, including anticipated dietary exposure from food, water, and all other types of non-occupational exposures.

D. Cumulative Effects

Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of particular pesticide's residues

and "other substances that have a common mechanism of toxicity." EPA does not have, at this time, available data to determine whether cyprodinil has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. For the purposes of this tolerance action, EPA has not assumed that cyprodinil has a common mechanism of toxicity with other substances.

E. Safety Determination

The chronic dietary exposure analysis (food only) showed that exposure from all established and proposed cyprodinil uses would be 7.48% of the chronic RfD for the most sensitive subpopulation, children 1 and 2 years old. EPA has determined that reliable data support using the standard MOE and uncertainty factor (100 for combined interspecies and intraspecies variability) for cyprodinil and that an additional safety factor of 10 is not necessary to be protective of infants and children.

Acute drinking water levels of comparison (DWLOC) were calculated based on an acute population adjusted dose (PAD) of 1.5 mg/kg/day. For the acute assessment, the females (13–50 years) subpopulation generated an acute DWLOC of approximately 44,600 ppb. The acute EEC of 32 ppb is considerably less than 44,600 ppb. For the chronic assessment, the children 1 and 2 years old subpopulation generated the lowest chronic DWLOC of approximately 280 ppb. Thus, the chronic DWLOC of 280 ppb is considerably higher than the chronic EEC of 6 ppb.

Syngenta Crop Protection, Inc., has considered the potential aggregate exposure from food, water, and non-occupational exposure routes, and concluded that aggregate exposure is not expected to exceed 100% of the chronic RfD and that there is a reasonable certainty that no harm will result to infants and children from the aggregate exposure to cyprodinil.

F. International Tolerances

There are no Codex maximum residue levels established for cyprodinil.

[FR Doc. 03–28312 Filed 11–10–03; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2003–0355; FRL–7333–2]

Issuance of an Experimental Use Permit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted an experimental use permit (EUP) to the following pesticide applicant. An EUP permits use of a pesticide for experimental or research purposes only in accordance with the limitations in the permit.

FOR FURTHER INFORMATION CONTACT: Dani Daniel, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5409; e-mail address: daniel.dani@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. Although this action may be of particular interest to those persons who conduct or sponsor research on pesticides, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the information in this action, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies Of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPP–2003–0355. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA

Dockets at <http://www.epa.gov/edocket/> to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

II. EUP

EPA has issued the following EUP:
432-EUP-7. Issuance. Bayer Environmental Science, a business group of Bayer CropScience, LP, 95 Chestnut Ridge Road Montvale, NJ 07645. This EUP allows the use of 312.84 pounds of the insecticide Imidacloprid on 825 structures to evaluate the control of subterranean termites, drywood termites, dampwood termites, carpenter ants, and other wood-infesting insects. The program is authorized only in the States of Alabama, Arizona, Arkansas, California, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia. The EUP is effective from November 1, 2003 to December 31, 2005.

Authority: 7 U.S.C. 136c.

List of Subjects

Environmental protection,
 Experimental use permits.

Dated: November 4, 2003.

Debra Edwards,

Director, Registration Division, Office of
 Pesticide Programs.

[FR Doc. 03-28311 Filed 11-10-03; 8:45 am]

BILLING CODE 6560-50-S

ENVIRONMENTAL PROTECTION AGENCY

[FRL-7585-5]

Proposed Third Administrative Cashout Settlement Under Section 122(g) of the Comprehensive Environmental Response, Compensation, and Liability Act; in Re: Beede Waste Oil Superfund Site, Plaistow, NH

AGENCY: Environmental Protection
 Agency (EPA).

ACTION: Notice of proposed third
 administrative settlement and request
 for public comment.

SUMMARY: In accordance with section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. 9622(i), notice is hereby given of a proposed third administrative settlement for recovery of past and projected future response costs concerning the Beede Waste Oil Superfund Site in Plaistow, New Hampshire with the settling parties listed in the Supplementary Information portion of this notice. The U.S. Environmental Protection Agency—Region I (EPA) is proposing to enter into a third *de minimis* settlement agreement to address claims under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. 9601 *et seq.* The Beede Third *De Minimis* Settlement Administrative Order on Consent ("AOC") is modeled on the same or substantially similar terms and conditions as the Beede Second *De Minimis* Settlement of 2002, including reliance on the same cost basis. This third settlement addresses the 17 parties who raised, and submitted the necessary documentation for, an Ability to Pay ("ATP") claim in response to the second settlement, and it includes reduced cashout amounts for 10 of the 17 parties who demonstrated an inability to pay. For each party who submitted an ATP claim, EPA sought to determine whether there was a valid basis for finding the PRP unable to pay the full cashout amount without suffering severe undue financial hardship. Notice is being published to inform the public of the proposed third settlement and of the opportunity to comment. This third settlement, embodied in a CERCLA section 122(g) Administrative Order on Consent ("AOC"), is designed to resolve each settling party's liability at the Site for past work, past response costs and specified future work and response costs through covenants under sections 106 and 107 of CERCLA, 42 U.S.C. 9606 and 9607, as well as to resolve each such settling party's liability at the Site for past response costs and estimated future response costs by the State of New Hampshire, through its Department of Environmental Services. The proposed AOC requires the settling parties listed in the Supplementary Information section below to pay an aggregate total of approximately \$45,037.44. For thirty (30) days following the date of publication of this notice, the EPA will receive written

comments relating to this third settlement. The EPA will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The EPA's response to any comments received will be available for public inspection at the EPA Records Center, 1 Congress Street, Boston, MA 02114-2023 (Telephone Number: 617-918-1440).

DATES: Comments must be submitted on or before December 12, 2003.

ADDRESSES: The proposed third settlement is available for public inspection at the EPA Records Center, 1 Congress Street, Boston, MA 02114-2023. Please call 617-918-1440 to schedule an appointment. A copy of the proposed third settlement may be obtained from Kristin Balzano, U.S. Environmental Protection Agency, Region I, 1 Congress Street, Suite 1100 (SES), Boston, MA 02114-2023 (Telephone Number: 617-918-1772). Comments should reference the Beede Waste Oil Superfund Site in Plaistow, New Hampshire and EPA Docket No. CERCLA-01-2003-0038 and should be addressed to Kristin Balzano, U.S. Environmental Protection Agency, Region I, 1 Congress Street, Suite 1100 (SES), Boston, MA 02114-2023.

FOR FURTHER INFORMATION CONTACT: Cindy Lewis, U.S. Environmental Protection Agency, Region I, 1 Congress Street, Suite 1100 (SES), Boston, MA 02114-2023 (Telephone Number: 617-918-1889).

SUPPLEMENTARY INFORMATION: This section contains a list of the 12 settling parties. Each party name is accompanied by its 4-digit PRP identification number, a party-specific identifier uniquely associated with the PRP to which it refers. The following is a list of the settling parties to the proposed third settlement: A.J. Gagnon & Sons, Inc. (PRP #2195), Auto Radiator Service, Inc. (PRP #0401), Cargo Transport, Inc. (PRP #1787), Christie Transfer, Inc. (PRP #1924), City of Quincy (GRP #404), Internal Combustion, Ltd. (PRP #2691), James R. Nicholson, Individually (PRP #3716), LBJ Inc. (PRP #3043), New England Transmission Co., Inc. (PRP #3679), New Tern Harbor Marina, Inc. (PRP #3689), Roberts Motor Sales, Inc. (PRP #4344) and Wakefield Auto Service, Inc. (PRP #5235).

In accordance with the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, notice is hereby given of a

proposed third *de minimis* settlement agreement under section 122(g) of CERCLA concerning the Beede Waste Oil Superfund Site in Plaistow, NH. The third settlement was approved by EPA Region I, subject to review by the public pursuant to this notice.

The proposed third settlement has been approved by the United States Department of Justice and, for the State portion of the settlement, by the State of New Hampshire. EPA will receive written comments relating to this settlement for thirty (30) days from the date of publication of this Notice.

Dated: November 3, 2003.

Richard Cavagnero,

Acting Director, Office of Site Remediation and Restoration, EPA—Region I.

[FR Doc. 03-28309 Filed 11-10-03; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission

October 30, 2003.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Pub. L. 104-13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that

does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before December 12, 2003. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Judith B. Herman, Federal Communications Commission, Room 1-C804, 445 12th Street, SW., DC 20554 or via the Internet to *Judith-B.Herman@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202-418-0214 or via the Internet at *Judith-B.Herman@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060-0531.

Title: Local Multipoint Distribution Service (LMDS).

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 986.

Estimated Time Per Response: .25–20 hours.

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Total Annual Burden: 30,423 hours.

Total Annual Cost: \$2,025,000.

Needs and Uses: The Commission seeks extension of OMB approval of this information collection. The information requested in Parts 1, 2, 21, and 25 of the Commission's rules to redesignate the 27.5–29.5 GHz band, to reallocate the 29.5–30.0 GHz band, and to establish rules and policies for Local Multipoint Distribution Service (LMDS) and for Fixed Satellite Services, CC Docket No. 92-297 is used by the Commission staff in carrying out its duties to determine the technical, legal and other qualifications of applicants to operate a station in the LMDS.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03-28242 Filed 11-10-03; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

Sunshine Act Meeting; Open Commission Meeting; Thursday, November 13, 2003

November 6, 2003.

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Thursday, November 13, 2003, which is scheduled to commence at in Room TW-C305, at 445 12th Street, SW., Washington, DC.

Item No.	Bureau	Subject
1	Wireline Competition	<i>Title:</i> Rural Health Care Support Mechanism (WC Docket No. 02-60). <i>Summary:</i> The Commission will consider a Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking regarding modifications to its rules to improve the effectiveness of the rural health care support mechanism, which provides discounts to rural health care providers to access modern telecommunications for medical and health purposes.
2	Office of Engineering and Technology and International.	The Office of Engineering and Technology and the International Bureau will report on the Commission's implementation of the results of the 2003 World Radiocommunication Conference.
3	International	<i>Title:</i> Procedures to Govern the Use of Satellite Earth Stations on Board Vessels in the 5925–6425 MHz/3700–4200 MHz Bands and 14.0–14.5 GHz/11.7–12.2 GHz Bands (IB Docket No. 02-10). <i>Summary:</i> The Commission will consider a Notice of Proposed Rulemaking concerning Earth stations on board vessels that are used to provide broadband telecommunications services on passenger, government, cargo, and recreational vessels.

Item No.	Bureau	Subject
4	Office of Engineering and Technology	<i>Title:</i> Revision of Parts 2 and 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (UNII) devices in the 5 GHz band (ET Docket No. 03-122; RM-10371). <i>Summary:</i> The Commission will consider a Report and Order to provide an additional 255 MHz of spectrum for unlicensed wireless devices operating in the 5 GHz region of the spectrum.
5	Office of Engineering and Technology	<i>Title:</i> Establishment of an Interference Temperature Metric to Quantify and Manage Interference to Expand Available Unlicensed Operation in Certain Fixed, Mobile and Satellite Frequency Bands. <i>Summary:</i> The Commission will consider a Notice of Inquiry and Notice of Proposed Rulemaking concerning the development and use of the interference temperature metric and for managing the transition from the current transmitter-based approach for interference management to the new interference temperature paradigm. The Commission will address interference temperature limits and procedures for assessing the interference for expanded unlicensed operation.
6	Spectrum Policy Task Force	The Spectrum Policy Task Force will report on accomplishments and status of the implementation of recommendations in the Task Force Report one year after its release and will highlight ongoing and future spectrum policy reform initiatives.
7	Wireless Telecommunications, International, and Wireline Competition.	<i>Title:</i> Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems (CC Docket No. 94-102); and Amendment of Parts 2 and 25 to Implement the Global Mobile Personal Communications by Satellite (GMPCS) Memorandum of Understanding and Arrangements; Petition of the National Telecommunications and Information Administration to Amend Part 25 of the Commission's Rules to Establish Emissions Limits for Mobile and Portable Earth Stations Operating in the 1610-1660.5 MHz Band (IB Docket No. 99-67). <i>Summary:</i> The Commission will consider a Report and Order and Second Further Notice of Proposed Rulemaking concerning the scope of its enhanced 911 rules.

Additional information concerning this meeting may be obtained from Audrey Spivack or David Fiske, Office of Media Relations, (202) 418-0500; TTY 1-888-835-5322.

Audio/Video coverage of the meeting will be broadcast live over the Internet from the FCC's Audio/Video Events Web page at <http://www.fcc.gov/realaudio>.

For a fee this meeting can be viewed live over George Mason University's Capitol Connection. The Capitol Connection also will carry the meeting live via the Internet. To purchase these services call (703) 993-3100 or go to <http://www.capitolconnection.gmu.edu>. Audio and video tapes of this meeting can be purchased from CACI Productions, 341 Victory Drive, Herndon, VA 20170, (703) 834-1470, Ext. 19; Fax (703) 834-0111.

Copies of materials adopted at this meeting can be purchased from the FCC's duplicating contractor, Qualex International (202) 863-2893; Fax (202) 863-2898; TTY (202) 863-2897. These copies are available in paper format and alternative media, including large print/type; digital disk; and audio tape. Qualex International may be reached by e-mail at Qualexint@aol.com.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03-28455 Filed 11-7-03; 3:08 pm]

BILLING CODE 6712-01-P

FEDERAL MARITIME COMMISSION

Sunshine Act: Notice of Meeting

AGENCY HOLDING THE MEETING: Federal Maritime Commission.

TIME AND DATE: 10 a.m., November 19, 2003.

PLACE: 800 North Capitol Street, NW., First Floor Hearing Room, Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: 1. Docket No. 99-13—The Content of Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984; Proposed Revisions to the Commission's Regulations Regarding the Filing of Agreement Minutes, 46 CFR 535; Proposed Modifications to the Information Form and Monitoring Report Regulations, 46 CFR parts 501 and 535; Proposed Rulemaking Regarding Transshipment Agreements Under the Shipping Act of 1984.

FOR FURTHER INFORMATION CONTACT: Bryant L. VanBrakle, Secretary, (202) 523-5725.

Bryant L. VanBrakle

Secretary.

[FR Doc. 03-28433 Filed 11-7-03; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than November 26, 2003.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166-2034:

1. *Norma Smith Revocable Living Trust*, and Norma Lee Smith, as trustee, Poplar Bluff, Missouri; and Joseph Thomas McLane, Poplar Bluff, Missouri; Jana Lee Poteet, Poplar Bluff, Missouri; and Jerri Ann Williams, Roswell, Georgia; to acquire additional voting shares of Poplar Bluff Banc Company, Poplar Bluff, Missouri, and thereby indirectly acquire additional voting

shares of First Midwest Bank of Poplar Bluff, Poplar Bluff, Missouri.

Board of Governors of the Federal Reserve System, November 5, 2003.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 03-28343 Filed 11-10-03; 8:45 am]

BILLING CODE 6210-01-S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center Web site at www.ffiec.gov/nic/.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 5, 2003.

A. Federal Reserve Bank of Boston (Richard Walker, Community Affairs Officer) 600 Atlantic Avenue, Boston, Massachusetts 02106-2204:

1. *New Alliance Bancshares, Inc.*, New Haven, Connecticut; to become a bank holding company by acquiring 100 percent of the voting shares of The New Haven Savings Bank, New Haven, Connecticut, and Connecticut Bankshares, Inc., Manchester, Connecticut; Alliance Bancorp of New

England, Inc., Vernon, Connecticut; Tolland Bank, Vernon, Connecticut; and The Savings Bank of Manchester, Manchester, Connecticut.

B. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. *CBS Financial Corporation*, Smyrna, Georgia; to become a bank holding company by acquiring control of Community Bank of the South, Smyrna, Georgia.

C. Federal Reserve Bank of Minneapolis (Richard M. Todd, Vice President and Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480-0291:

1. *State Bank of Cokato ESOP II*, Cokato, Minnesota; to acquire additional shares, for a total of 100 percent of the voting shares of Cokato Bancshares, Inc., Cokato, Minnesota, and thereby indirectly acquire State Bank of Cokato, Cokato, Minnesota.

Board of Governors of the Federal Reserve System, November 5, 2003.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 03-28342 Filed 11-10-03; 8:45 am]

BILLING CODE 6210-01-S

GENERAL SERVICES ADMINISTRATION

Office of Governmentwide Policy; Cancellation of an Optional Form by the Department of State

AGENCY: General Services Administration.

ACTION: Notice.

SUMMARY: The Department of State is cancelling the following Optional Form because of low demand in the Federal Supply Service: OF 144, Temporary Duty (TDY) Official Travel Authorization.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Cunningham, Department of State, 202.312-9605.

DATES: Effective November 12, 2003.

Dated: November 3, 2003.

Barbara M. Williams,

Deputy Standard and Optional Forms Management Officer, General Services Administration.

[FR Doc. 03-28288 Filed 11-10-03; 8:45 am]

BILLING CODE 6820-34-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Notice of Upcoming Public Consultation

AGENCY: Administration for Children and Families, Department of Health and Human Services.

ACTION: Notice of upcoming public consultation.

SUMMARY: The Administration for Children and Families (ACF), in conjunction with the National Congress of American Indians (NCAI), will be holding a one-day Consultation Session on December 2, 2003 at the Sheraton Wild Horse Pass Resort in Phoenix, Arizona.

DATES: December 2, 2003.

Consultation Submission Information: Those interested in submitting Consultation Session topics for the agenda or participating in the tribal planning committee to assist in the development of the Consultation Session agenda should contact NCAI Fellow Christina Morrow at (202) 466-7767 or cmorrow@ncai.org.

If you are proposing a topic to be addressed in the Consultation Session, please be sure to include a brief description of the topic and the name and contact information of the suggested presenter.

SUPPLEMENTARY INFORMATION: ACF would like to invite Tribal leaders to participate in a formal Consultation Session, facilitated by NCAI. The Consultation Session will take place on Tuesday, December 2, 2003, from 9 a.m. to 5 p.m., the day before the ACF National Native American Conference. ACF senior leadership will be present for the Consultation Session.

The intent of this Consultation Session is for ACF officials to hear firsthand from tribal leaders, as well as representatives from tribal organizations and community-based non-profits, about the implementation of ACF programs in native communities. Of particular interest are the challenges that tribes and tribal organizations face in accessing ACF program funding and using programmatic funding to support social and economic development activities in Native American communities. ACF offices such as the Administration for Native Americans, the Office of Child Support Enforcement, the Office of Community Services, the Office of Family Assistance, the Child Care Bureau, the Children's Bureau, the Head Start

Bureau, and the Family and Youth Services Bureau will be represented.

Because of the limited time for this day-long Consultation Session, ACF has partnered with the NCAI to plan and facilitate the session. NCAI will be responsible for coordinating the stakeholders who wish to participate in the Consultation Session. NCAI will work with a tribal planning committee to develop a structured agenda, identifying key issues to be raised and spokespersons to present testimony on the issues.

For further information for the ACF National Native American Conference contact: Stacia Henderson at 703-821-2226 x232 at Native American Management Services, Inc. (NAMS) or toll-free 866-313-2955 or on-line at: <http://www.acfconference@namsinc.org>.

Dated: November 5, 2003.

Quanah Crossland Stamps,

Commissioner, Administration for Native Americans.

[FR Doc. 03-28336 Filed 11-10-03; 8:45 am]

BILLING CODE 4184-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N-0481]

Agency Information Collection Activities; Proposed Collection; Comment Request; Food Additive Petitions

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the Federal Register concerning each proposed collection of information and to allow 60 days for public comment in response to the

notice. This notice solicits comments on food additive petitions.

DATES: Submit written or electronic comments on the collection of information by January 12, 2004.

ADDRESSES: Submit electronic comments on the collection of information to: <http://www.fda.gov/dockets/ecomments>. Submit written comments on the collection of information to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Office of Management Programs (HFA-250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-827-1472.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501-3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed [extension/reinstatement] of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's

estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Food Additive Petitions—21 CFR Part 571

Section 409(a) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 348(a)) provides that a food additive shall be deemed to be unsafe unless its use is permitted by a regulation that prescribes the condition(s) under which it may safely be used, or unless it is exempted by regulation for investigational use. Section 409(b) of the act specifies the information that must be submitted by a petition in order to establish the safety of a food additive and to secure the issuance of a regulation permitting its use.

To implement the provision of section 409 of the act, procedural regulations have been issued under part 571 (21 CFR part 571). These procedural regulations are designed to specify more thoroughly the information that must be submitted to meet the requirement set down in broader terms by the law. The regulations add no substantive requirements to those indicated in the law, but attempt to explain the requirements and provide a standard format for submission to speed the processing of the petition. Labeling requirements for food additives intended for animal consumption are also set forth in various regulations contained in 21 CFR parts 572, 573, and 580. The labeling regulations are considered by FDA to be cross referenced to § 571.1, which is the subject of this same OMB clearance for food additive petitions.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN¹

21 CFR Section	Number of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
571.1(c) moderate category	1	1	1	1,800	1,800
571.1(c) complex category	1	1	1	6,000	6,000
571.6	2	2	4	1,300	5,200

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN¹—Continued

21 CFR Section	Number of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
TOTAL	4	4	6	9,100	13,000

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: November 4, 2003.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 03–28252 Filed 11–10–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; Obstetrician-Gynecologists' Knowledge and Practice Patterns With Regard to Hormone Therapy

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Heart, Lung and Blood Institute (NHLBI), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Title: Obstetrician-Gynecologists' Knowledge and Practice Patterns with Regard to Hormone Therapy. *Type of Information Collection Request:* NEW. *Need and Use of Information Collection:* This study will evaluate and track the effect of results from the Federally-funded Women's Health Initiative (WHI) trials of estrogen plus progestin and estrogen alone, and of updated guidelines provided by Federal agencies and professional bodies, on the knowledge, attitudes and prescription behavior of members of the American College of Obstetricians and Gynecologists (ACOG) in regard to the use of postmenopausal hormone therapy. The publication of the WHI trial findings for estrogen plus progestin in 2002 generated massive media coverage and revisions to the guidelines for the use of hormones, including revisions of the package insert by the Food and Drug Administration. The revised view of the value of hormone therapy to prevent chronic diseases has had a major impact on obstetrician-gynecologists, who are among the principal health care providers for women and who now account for the majority of prescriptions

for postmenopausal hormones. The investigators propose to survey fellows of ACOG over a four and a half year period. Objectives of the study are to evaluate the extent to which the WHI findings for estrogen plus progestin have been accepted by ACOG members, and what the effect has been on their prescription patterns. The initial two surveys will also form a baseline for two further surveys subsequent to the anticipated publication of the WHI estrogen-only trial results in 2005. The findings will provide valuable information concerning ACOG members' knowledge of current and past research findings regarding hormone therapy, their awareness of ACOG and Federal guidelines for the use of hormone therapy, their own current practice and changes from past practice, their concerns and informational and educational needs. The proposed surveys, performed over a period, will allow the investigators to track changes in knowledge, attitudes, and practice over a period of evolving knowledge among a representative sample of obstetrician-gynecologists. The finding will assist the Government and professional bodies in evaluating the degree of translation of research findings into practice, and with developing educational materials for physicians to assist with translation. *Frequency of Response:* On occasion. *Affected Public:* Individuals or households; Businesses or other for-profit. *Type of Respondents:* Physicians. The annual reporting burden is as follows: *Estimated Number of Respondents:* 1825; *Estimated Number of Responses per Respondent:* 1; *Average Burden Hours Per Response:* 25, and *Estimated Total Annual Burden Hours Requested:* 456. The annualized costs to respondents is estimated at: \$34,200. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's

estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Dr. Jacques E. Rossouw, Project Officer, Women's Health Initiative, NHLBI, NIH, Rockledge 1 Building, Suite 300, 6705 Rockledge Drive, Bethesda, MD 20892, or call (301) 435–6669 (not a toll-free number) or E-mail you request, including your address to: rossouw@nih.gov.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60-days of the date of this publication.

Dated: October 28, 2003.

Jacques Rossouw,

NHLBI, National Institutes of Health.

[FR Doc. 03–28281 Filed 11–10–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the Board of Scientific Counselors, NHLBI.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 52b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Heart, Lung, and Blood Institute, including consideration of personnel

qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NHLBI.

Date: December 11–12, 2003.

Time: 8:30 a.m. to 1 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Embassy Room, Bethesda, MD 20814.

Contact Person: Elizabeth G. Nabel, MD, Scientific Director for Clinical Research, National Heart, Lung, and Blood Institute, Division of Intramural Research, Building 10, Room 8C103, MSC 1754, Bethesda, MD 20892, (301) 496–1518.

Information is also available on the Institute's/Center's Home Page: <http://www.nhlbi.nih.gov/meetings/index.htm>, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: November 4, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–28279 Filed 11–10–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung and Blood Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the Sleep Disorders Research Advisory Board.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Sleep Disorders Research Advisory Board.

Date: December 9, 2003.

Time: 8:30 a.m. to 5 p.m.

Agenda: To discuss sleep research and education priorities and programs.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892.

Contact: Carl E. Hunt, MD, Director, National Center of Sleep Disorders Research, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, Room 10138, Bethesda, MD 20892, (301) 435–0199.

Information is also available on the Institute's/Center's Home Page: <http://www.nhlbi.nih.gov/meetings/index.htm>, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

November 4, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–28280 Filed 11–10–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel, Clinical Training Grants Review (K23 & K24).

Date: November 11, 2003.

Time: 2 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health at NIAMS, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Glen H. Nuckolls, Ph.D., Scientific Review Administrator, National Institutes of Health, National Institute of

Arthritis, Musculoskeletal, and Skin Diseases, 6701 Democracy Boulevard, Bldg. 1, Ste 800, Bethesda, MD 20892, 301–594–4974, nuckollg@mail.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: November 5, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–28301 Filed 11–10–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel; Review of Research Program Project Grants.

Date: November 19, 2003.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Teresa Nesbitt, Ph.D., Scientific Review Administrator, National Institute of Arthritis and Musculoskeletal and Skin Diseases, National Institutes of Health, 6701 Democracy Blvd., Suite 800, Bethesda, MD 20892, (301) 594–4958.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: November 5, 2003.

LaVerne Y. Stringfield,

*Director, Office of Federal Advisory
Committee Policy.*

[FR Doc. 03-28302 Filed 11-10-03; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel, SCORE and RISE.

Date: December 4, 2003

Time: 8:30 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications

Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave, Bethesda, MD 20814.

Contact Person: Rebecca H. Johnson, Ph.D., Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN18, Bethesda, MD 20892, 301-594-2771, johnsonrh@nigms.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Career; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: November 5, 2003.

LaVerne Y. Stringfield,

*Director, Office of Federal Advisory
Committee Policy.*

[FR Doc. 03-28303 Filed 11-10-03; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the Recombinant DNA Advisory Committee.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Recombinant DNA Advisory Committee.

Date: December 3-4, 2003.

Time: 8 a.m. to 6 p.m.

Agenda: Protocol review, Data Management, a review and discussion of the final RAC Informed Consent Working Group Guidance, and a presentation by Dr. Shawn Burgess, Head of the Developmental Genomics Section, Genome Technology Branch, NHGRI, NIH on "Integration Sites of Retroviral Vectors in the Human Genome."

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Stephen M. Rose, Ph.D., Executive Secretary, Office of Biotechnology Activities, National Institutes of Health, 6705 Rockledge Drive, Room 750, Bethesda, MD 20892, 301-496-9838, sr8@nih.gov.

Information is also available on the Institute's/Center's Home Page: www4.od.nih.gov/oba/, where an agenda and any additional information for the meeting will be posted when available.

OMB's "Mandatory Information Requirements for Federal Assistance Program Announcements" (45 FR 39592, June 11, 1980) requires a statement concerning the official government programs contained in the Catalog of Federal Domestic Assistance. Normally NIH lists in its announcements the number and title of affected individual programs for the guidance of the public. Because the guidance in this notice covers virtually every NIH and Federal research program in which DNA recombinant molecule techniques could be used, it has been determined not to be cost effective or in the public interest to attempt to list these programs. Such a list would likely require several additional pages. In addition, NIH could not be certain that every Federal program would be included as many Federal agencies, as well as private organizations, both national and international, have elected to follow the NIH Guidelines. In lieu of the individual program listing, NIH invites readers to direct questions to the information address above about whether individual programs listed in the Catalog of Federal Domestic Assistance are affected.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research

Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: November 5, 2003.

LaVerne Y. Stringfield,

*Director, Office of Federal Advisory
Committee Policy.*

[FR Doc. 03-28304 Filed 11-10-03; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, November 5, 2003, 8:30 a.m. to November 6, 2003, 10 a.m., Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814 which was published in the **Federal Register** on October 31, 2003, 68 FR 62092-62094.

The meeting will be one day only November 5, 2003, from 8:30 a.m. to 6 p.m. The location remains the same. The meeting is closed to the public.

Dated: November 4, 2003.

LaVerne Y. Stringfield,

*Director, Office of Federal Advisory
Committee Policy.*

[FR Doc. 03-28277 Filed 11-10-03; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, November 5, 2003, 8 a.m. to November 6, 2003, 5 p.m., Governor's House Hotel, 1615 Rhode Island Avenue, NW., Washington, DC 20036, which was published in the **Federal Register** on October 31, 2003, 68 FR 62092-62094.

The meeting will be held at the St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036. The meeting dates and time remain the same. The meeting is closed to the public.

Dated: November 4, 2003.

LaVerne Y. Stringfield,

*Director, Office of Federal Advisory
Committee Policy.*

[FR Doc. 03-28278 Filed 11-10-03; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. General Electric Company & Instrumentarium OYJ

Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for that District of Columbia in *United States v. General Electric Co.*, Civil Action No. 03CV01923. On September 16, 2003, the United States filed a Complaint alleging that the proposed acquisition of Instrumentarium OYJ (“Instrumentarium”) by General Electric Company (“GE”) is in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, requires the defendants to fully divest Instrumentarium’s Spacelabs business, which is its primary manufacturing, distribution, research and development and sales operation for critical care monitors; and Instrumentarium’s Ziehm business, which comprises Instrumentarium’s C-arm business. Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice in Washington, DC, Room 200, 325 Seventh Street, NW., on the Internet at <http://www.usdoj.gov/atr>, and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to James R. Wade, Chief, Litigation III Section, Antitrust Division, Department of Justice, 325 Seventh Street, NW., Suite 300,

Washington, DC 20530 (telephone: (202) 616–5935).

J. Robert Kramer II,

Director of Operations, Antitrust Division.

Final Judgment

Whereas, plaintiff, United States of America, filed its Complaint on September 16, 2003, plaintiff and defendants, General Electric Company (“GE”) and Instrumentarium OYJ (“Instrumentarium”), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

And whereas, defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the defendants to assure that competition is not substantially lessened;

And whereas, plaintiff requires defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

And whereas, defendants have represented to the United States that the divestitures required below can and will be made and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, *it is ordered, adjudged, and decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties of this action. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

II. Definitions

As used in this Final Judgment:

A. “GE” means defendant General Electric Company, a New York corporation with its headquarters in Fairfield, Connecticut, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

B. “Instrumentarium” means defendant Instrumentarium OYJ, a

public limited-liability company existing under the laws of Finland, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. “Patient monitors” means multiparameter medical devices that provide continuous, real-time evaluations of patient vital signs.

D. “C-arms” means full-size, mobile fluoroscopic x-ray machines that are used to provide continuous, real-time viewing of patients during various medical procedures.

E. “Spacelabs” means the Spacelabs business as described in schedule 1, including Annexes 1–4, of the Commitments that GE has entered into with the European Commission regarding divestiture of Spacelabs, approved on September 2, 2003, and attached as Exhibit 1 (motion pending to file under seal). A non-confidential version of Schedule 1 is attached as Exhibit 2. Provided, however, that the Acquirer of Spacelabs shall grant GE a license to technology embodied in the Instrumentarium Medical Connector, the terms and duration of such license to be negotiated between GE and the Acquirer, limited to the field of use of nine-pin connectors for patient monitoring equipment, including, but not limited to, any patent issuing on the patent application currently entitled “Latching Medical Patient Parameter Safety Connector and Method” submitted in the name of Datex-Ohmeda, Inc., to the U.S. Patent and Trademark Office on August 19, 2003, and any continuations, continuations in part, or reissue applications based on such application.

F. “Ziehm” means Instrumentarium’s C-arm business and its line of C-arm products, currently conducted through Instrumentarium Imaging Ziehm, Inc. and Instrumentarium Imaging Ziehm GmbH, and including, but not limited to, the facility located at 4181 Latham Street, Riverside, California 92501 and the facility located at Isarstrasse 40, d-90451 Nuremberg, Germany, and also including:

1. All tangible assets that comprise Instrumentarium’s C-arm business, including research and development activities; all manufacturing equipment, tooling and fixed assets, personal property, inventory, office furniture, materials, supplies and other tangible property, and all assets used in connection with the Ziehm business; all licenses permits, and authorizations issued by any governmental organization relating to the Ziehm business; all contracts, teaming

arrangements, agreements, leases, commitments, certifications, and undertakings relating to the Ziehm business, including supply and distribution agreements; all customer lists, contracts, accounts, and credit records; all repair and performance records and all other records relating to the Ziehm business. Provided, however, that the Ziehm C-arm assets to be divested shall not include Instrumentarium facilities that are primarily used in connection with the Instrumentarium activities other than the C-arm business, which consist of Instrumentarium facilities where: (1) Administrative functions are performed; (2) Instrumentarium's 3D-imaging research and development project ("Instrumentarium's 3D Project") is conducted; and (3) sales and distribution activities are managed.

2. All intangible assets used in the development, production, servicing, and sale of Instrumentarium's C-arm products, including, but not limited to, all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names (except to the extent such trademarks, trade names, service marks, or service names contain the trademark or names of Instrumentarium, Instrumentarium Imaging, or any variation thereof), technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, all research data concerning historic and current research and development related to the Ziehm business, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information defendants provide to their own employees, customers, suppliers, agents, or licensees, and all research data concerning historic and current research and development efforts relating to the Ziehm business, including but not limited to designs of experiments, and the results of successful and unsuccessful designs and experiments. Provided, however, that Instrumentarium's 3D Project shall not be included within the definition of the Ziehm C-arm business to be divested, but defendants shall: (1) Maintain and continue this project at 2002 or previously approved 2003 levels, whichever are higher; (2) enter into a joint research and development agreement with the Acquirer of Ziehm, at no cost to the Acquirer of Ziehm and

for a period of time not to exceed one year, in connection with and to continue Instrumentarium's 3D Project ("the 3D Development Agreement"); and grant the Acquirer of Ziehm a perpetual, assignable, royalty-free nonexclusive license, limited to the field of use of C-arms, to all Instrumentarium rights to know how, technology, and patents relating to 3D imaging developed in the 3D Project that exist at the end of the term of the 3D Development Agreement ("Licensed Technology"). GE will further covenant not to sue the Acquirer of Ziehm with respect to claims based on such patent rights relating to the Licensed Technology.

G. "Acquirer" means the entity to which defendants divest Spacelabs or the entity to which defendants divest Ziehm; except that, in Sections IV and V, Acquirer shall only mean the entity to which defendants divest Spacelabs, and in Sections VI and VII, Acquirer shall only mean the entity to which defendants divest Ziehm.

H. "Divestiture Assets" means Spacelabs and/or Ziehm.

III. Applicability

A. This Final Judgment applies to GE and Instrumentarium, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. Should the defendants, not in connection with making either of the divestitures required by this Final Judgment, sell or dispose of all or substantially all of their assets used in the C-arm of patient monitor business, they shall require, as a condition of such sale of disposition, that the purchaser agrees to be bound by the provisions of this Final Judgment; provided, however, that defendants need not obtain such an agreement from the Acquirer.

IV. Divestiture of Spacelabs

A. Defendants are ordered and directed, within one hundred twenty (120) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest Spacelabs in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States in its sole discretion. The United States, in its sole discretion, may agree to an extension of this time period of up to two, thirty (30) day periods, not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use

their best efforts to divest Spacelabs as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, defendants promptly shall make known, by usual and customary means, the availability of Spacelabs. Defendants shall inform any person making inquiry regarding a possible purchase of Spacelabs that it is being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to Spacelabs customarily provided in a due-diligence process, except such information or documents subject to the attorney-client or work-product privileges. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendants shall provide each prospective Acquirer and the United States information relating to the personnel involved in the production, operation, development, and sale of Spacelabs's patient monitoring products to enable the Acquirer to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer to employ any defendant employee whose primary responsibility is the production, operation, development, or sale of Spacelabs's patient monitors. For a period of eighteen (18) months from the date of the divestiture of the Spacelabs business, defendants shall not solicit to hire, or hire, any such defendant employee that receives a substantially equivalent offer of employment from the approved Acquirer of the Spacelabs business, unless such employee is terminated or laid off by the Acquirer, or the Acquirer agrees that defendants may solicit and hire that employee.

D. Defendants shall permit prospective Acquirers of Spacelabs to have reasonable access to personnel and to make inspections of the physical facilities of the business to be divested; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due-diligence process.

E. Defendants shall warrant to the Acquirer of Spacelabs that each asset will be operational on the date of sale.

F. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of Spacelabs.

G. Defendants shall warrant to the Acquirer of Spacelabs that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of each asset, and that following the sale of Spacelabs, defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of Spacelabs.

H. Unless the United States otherwise consents in writing, the divestiture pursuant to section IV, or by trustee appointed pursuant to section V, of this Final Judgment, shall include the entire Spacelabs business as defined in section II.E, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that Spacelabs can and will be used by the Acquirer as part of a viable, ongoing business in the manufacture and sale of patient monitors in the United States. The divestiture, whether pursuant to section V of this Final Judgment,

1. Shall be made to the Acquirer that, in the sole discretion of the United States, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the manufacture and sale of patient monitors in the United States; and

2. Shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between the Acquirer and defendants gives defendants the ability unreasonably to raise the Acquirer's costs to lower the Acquirer's efficiency or otherwise to interfere in the ability of the Acquirer to compete effectively.

V. Appointment of Trustee To Divest Spacelabs

A. If defendants have not divested Spacelabs with the time period specified in Section IV.A., defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States in good-faith consultation with the European Commission to ensure selection of a trustee acceptable to both the United States and the European Commission and approved by the Court to effect the divestiture of Spacelabs.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell Spacelabs. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effect by the trustee, subject to the provisions of sections IV, V, and VIII of this Final Judgment, and shall have

such other powers as this Court deems appropriate. Subject to section V.D. of this Final Judgment, the trustee may hire at the cost and expense of defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee to any ground other than the trustee's malfeasance or that the Acquirer has not been approved by the European Commission. Any objection by defendants on the ground of trustee malfeasance must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under section VIII.A; any objection by defendant based on lack of approval from the European Commission must be conveyed in writing to the United States and the trustee within two (2) days after the United States provides defendants with written notice, pursuant to Section VIII.C, stating that it does not object to the proposed divestiture of Spacelabs.

D. The trustee shall serve at the cost and expense of defendants, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of the assets of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendants, and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of Spacelabs and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accounts, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in Spacelabs, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest Spacelabs.

G. If the trustee has not accomplished such divestiture within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the plaintiff who shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

IV. Divestiture of Ziehm

A. Defendants are ordered and directed, within one hundred twenty (120) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest Ziehm in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States in its sole discretion. The United States, in its sole discretion, may agree to an extension of this time period of up to two, thirty (30) day periods, not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest Ziehm as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, defendants promptly shall make known,

by usual and customary means, the availability of Ziehm. Defendants shall inform any person making inquiry regarding a possible purchase of Ziehm that it is being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to Ziehm customarily provided in a due-diligence process except such information or documents subject to the attorney-client or work-product privileges. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendants shall provide each prospective Acquirer and the United States information relating to the personnel involved in the production, operation, development, and sale of Ziehm's C-arm products to enable the Acquirer to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer to employ any defendant employee whose primary responsibility is the production, operation, development, or sale of Ziehm's C-arms. For a period of eighteen (18) months from the date of the divestiture of the Ziehm business, defendants shall not solicit to hire, or hire, any such defendant employee that receives a substantially equivalent offer of employment from the approved Acquirer of the Ziehm business, unless such employee is terminated or laid off by the Acquirer, or the Acquirer agrees that defendants may solicit and hire that employee.

D. Defendants shall permit prospective Acquirers of Ziehm to have reasonable access to personnel and to make inspections of the physical facilities of the business to be divested; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due-diligence process.

E. Defendants shall warrant to the Acquirer of Ziehm that each asset will be operational on the date of sale.

F. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of Ziehm.

G. Defendants shall warrant to the Acquirer of Ziehm that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of each asset, and that following the sale of Ziehm, defendants

will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of Ziehm.

H. Unless the United States otherwise consents in writing, the divestiture pursuant to Section VI, or by trustee appointed pursuant to Section VII, of this Final Judgment, shall include the entire Ziehm business as defined in Section II.F, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that Ziehm can and will be used by the Acquirer as part of a viable, ongoing business in the manufacture and sale of C-arms in the United States. The divestiture, whether pursuant to section VI or section VII of this Final Judgment,

1. Shall be made to the Acquirer that, in the sole discretion of the United States, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the manufacture and sale of C-arms in the United States; and

2. Shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between the Acquirer and defendants give defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

VII. Appointment of Trustee To Divest Ziehm

A. If defendants have not divested Ziehm within the time period specified in Section VI.A, defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of Ziehm.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell Ziehm. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable efforts by the trustee, subject to the provisions of sections VI, VII, and VIII of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to section VII.D of this Final Judgment, the trustee may hire at the cost and expense of defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under section VIII.

D. The trustee shall serve at the cost and expense of defendants, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendants, and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of Ziehm and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information or any applicable privileges. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in Ziehm, and shall describe in detail each contact

with any such person. The trustee shall maintain full records of all efforts made to divest Ziehm.

G. If the trustee has not accomplished such divestiture within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the plaintiff who shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VIII. Notice of Proposed Divestitures

A. Within two (2) business days following execution of a definitive divestiture agreement, defendants or the trustee, whichever is then responsible for effecting any divestiture required herein, shall notify the United States of any proposed divestiture required by sections IV, V, VI, or VII of this Final Judgment. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from defendants, the proposed Acquirer(s), any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer(s), and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request unless the parties shall otherwise agree.

C. Within thirty (30) calendar days receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer(s), any third party, and the trustee, whichever is

later, the United States shall provide written notice to defendants and the trustee, if there is one, stating whether it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Sections V.C or VII.C of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer(s) or upon objection by the United States, a divestiture proposed under Sections IV, V, VI, or VII shall not be consummated. Upon objection by defendants under section V.C or VII.C, a divestiture proposed under section V or VII shall not be consummated unless approved by the Court.

IX. Financing

Defendants shall not finance all or any part of any purchase made pursuant to section IV, V, VI, or VII of this Final Judgment.

X. Hold Separate

Until all of the divestitures required by this Final Judgment have been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize any divestiture order by this Court.

XI. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until each divestiture has been completed under section IV, V, VI, or VII, defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with section IV, V, VI, or VII of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendants have taken to solicit buyers for the Divestiture Assets and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by defendants, including limitation on

information, shall be made within fourteen (14) days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with section X of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall individually keep all records of each of their individual efforts made to preserve and divest the Divestiture Assets until one year after all such divestitures have been completed.

XII. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

1. Access during defendants' office hours to inspect and copy, or at plaintiff's option, to require defendants to provide copies of, all books, ledgers, accounts, records and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

2. To interview, either informally or on the record, defendants' officer, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this

section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the United States shall give defendants ten (10) calendar days' prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XIII. No Reacquisition

Defendants may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XIV. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to their Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XV. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of this entry.

XVI. Public Interest Determination

Entry of this Final Judgment is in the public interest.

Dated: _____.

Court approval subject to procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

United States District Judge

Competitive Impact Statement

Pursuant to Section 5(b) of the Clayton Act, as amended by Section 2 of the Antitrust Procedures and Penalties Act ("Tunney Act"), 15 U.S.C. 16(b)-(h), the United States files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

On September 16, 2003, the United States of America filed a civil antitrust Complaint alleging that the proposed acquisition by General Electric Company ("GE") of Instrumentarium OYJ ("Instrumentarium") would violate section 7 of the Clayton Act, 15 U.S.C. 18. The Complaint alleges that GE and Instrumentarium are two of the nation's three leading suppliers of patient monitors used to take the vital physiologic measurements of patients requiring critical care ("critical care monitors"). The Complaint further alleges that GE dominates the sale of full-size, mobile C-arms used for surgical, orthopedic, pain management, and basic vascular procedures ("orthopedic-vascular C-arms"), with Instrumentarium as one of three smaller players in that market. GE and Instrumentarium complete head-to-head in the development, manufacture, as sale of critical care monitors and orthopedic-vascular C-arms.

The Complaint alleges that the proposed acquisition would eliminate head-to-head competition between GE and Instrumentarium and would substantially increase the likelihood that GE will unilaterally increase the prices or reduce the product quality of critical care monitors and orthopedic-vascular C-arms to the detriment of consumers. The request for relief in the Complaint seeks: (1) A judgment that the proposed acquisition would violate Section 7 of the Clayton Act; (2) a permanent injunction preventing consummation of the proposed acquisition or preventing the defendants from entering into or carrying out any agreement, understanding, or plan, the effect of which would be to exchange those assets between the defendants; (3) an award of costs to the plaintiff; and (4) such other relief as the Court may deem just and proper.

When the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order and a proposed Final Judgment, which permit GE to complete its acquisition of Instrumentarium, yet preserve competition in the markets in which the proposed transaction raises significant competitive concerns. The proposed Final Judgment orders the defendants to divest two businesses to acquires that are acceptable to the United States: (1) Instrumentarium's Spacelabs business, which is Instrumentarium's primary manufacturing, distribution, research and development, and sales operations for critical care monitors; and (2) instrumentarium's Ziehm subsidiaries, which house Instrumentarium's C-arm

business and its line of C-arm products, currently conducted through Instrumentarium Imaging Ziehm, Inc. and Instrumentarium Imaging Ziehm GmbH. The defendants must complete the required divestitures within one hundred twenty (120) calendar days after the filing of the complaint in this matter, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later. The United States, in its sole discretion, may agree to an extension of this time period of up to two, thirty (30) day periods, not to exceed sixty (60) calendar days in total. Under the terms of the Hold Separate Stipulation and Order, GE is required to take certain steps to ensure that the assets to be divested are preserved and held separate from its other assets and businesses.

The United States and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the Tunney Act. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify or enforce provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. the Defendants and the Proposed Transaction

GE is a global technology and services company that has its principal office in Fairfield, Connecticut. GE Medical Systems, a subsidiary of GE, is a major worldwide provider of medical equipment products and services, including patient monitors and C-arms, and has its principal offices in Waukesha, Wisconsin. In 2002, GE had total revenues of approximately \$131.7 billion, and GE Medical Systems had revenues of approximately \$9 billion.

Instrumentarium is a major worldwide provider of medical equipment products and services, including patient monitor and C-arms, and has its principal offices in Helsinki, Finland. Instrumentarium manufactures and sells patient monitors through its Datas-Ohmeda and Spacelabs subsidiaries, and manufactures and sells C-arms through its Ziehm operation. Instrumentarium's revenues were approximately \$1 billion in 2002.

GE and Instrumentarium reached an agreement on December 18, 2002 that provides for GE to purchase Instrumentarium through a cash tender offer valued at approximately \$2 billion. This transaction, which would increase concentration in the already concentrated critical care monitor and

orthopedic-vascular C-arm markets, precipitated the government's suite.

B. Product Markets

1. Critical Care Monitors

a. *Description of the Market.* The Complaint alleges that patient monitors used to take the vital physiologic measurements of patients requiring critical care are a relevant product market within the meaning of Section 7 of the Clayton Act, 15 U.S.C. 18. Patient monitors are routinely used throughout hospitals and other healthcare facilities to measure and display information about various patient physiologic parameters. The parameters range from basic measurements, such as temperature, noninvasive blood pressure, and electrocardiography, to sophisticated invasive blood pressures (measurements of the blood pressure in various internal organs through the use of catheters). The information allows healthcare providers to monitor the health and stability of patients and is vital to the provision of healthcare.

Patients requiring critical care need more and different parameters monitored than do patients who are in less serious condition. To treat the patients requiring critical care, hospitals and other healthcare facilities must have monitors with the functionality to measure and simultaneously display information about a large number of parameters. Critical care monitors are sophisticated machines that can measure and display information regarding six or more patient parameters. In addition to basic parameters, critical care monitors typically measure cardiac output (the volume of blood pumped by the heart in a specific time period) and multiple invasive blood pressures. Critical care monitors also require significant networking capabilities so that information can be sent to and displayed at a central station.

Critical care monitors are distinct from other products, including monitors used to monitor patients in less serious condition ("low-acuity monitors") and monitors used in the operating room ("OR monitors"). Low-acuity monitors are less complex and significantly less expensive machines that measure fewer parameters. OR monitors used specialized software and technologies not required elsewhere in the hospital. They may be configured for anesthesia machine compatibility, monitor different parameters, such as the level of anesthetic gas in a patient's airway, and tend to be significantly more expensive.

A hospital or other healthcare facility seeking to purchase a critical care

monitor would not consider any other products—including monitor or an OR monitor—to be a realistic substitute. A small but significant increase in the price of a critical care monitor would not cause a sufficient number of hospitals or other healthcare facilities seeking to purchase a critical care monitor to switch to an OR monitor, a low-acuity monitor, or any other type of medical device so as to make such a price increase unprofitable and unsustainable.

The Complaint alleges that the relevant geographic market for the sale of critical care monitors in the United States. Any company seeking to sell a critical care monitor in the United States must register with the Food and Drug Administration ("FDA") and receive approval for its products. To be competitive, a critical care monitor supplier must also establish local distribution, service, and support networks. Thus, in the face of a small but significant increase in the price of critical care monitors, purchasers in the United States cannot turn to any producer of critical care monitors that has not received FDA approval for its products, and are unlikely to turn in substantial numbers to providers that have not established a sales and service presence in the United States.

b. *Harm to Competition as a Consequence of the Acquisition.* Critical care monitors are highly differentiated products, which are distinguished from each other by price, product features, vendor reputation, and customer service. The market for critical care monitors is already highly concentrated. GE, Instrumentarium, and one other firm are the leading suppliers. Based on shares of unit sales, GE has a share of approximately 33 percent of the market, and Instrumentarium has a share of approximately 16 percent. While there are other firms that manufacture critical care monitors, product limitations and other factors, such as their degree of customer acceptance, lessen the ability of these firms to compete for many customers.

GE and Instrumentarium have competed vigorously in the development, manufacture, and sale of critical care monitors. A significant number of customers view GE's and Instrumentarium's monitors as particularly close substitutes and do not view the products of the other vendors as equally close. In individualized negotiations, these customers have benefitted from the rivalry between GE and Instrumentarium, and received lower prices, better quality, or improved service as a result. Hospitals and other healthcare facilities that purchase

critical care monitors have also benefitted generally from competition between GE and Instrumentarium on price, innovation, product features, and service. The proposed transaction would eliminate the competition between GE and Instrumentarium, reduce the number of significant suppliers of critical care monitors from three to two, and substantially increase the likelihood that GE will unilaterally increase the price of critical care monitors to a significant number of customers.

Successful entry or expansion in the development, manufacture, and sale of critical care monitors is difficult, time-consuming, and costly, and is unlikely to defeat an anticompetitive price increase or reduction in product quality in the event that GE acquired Instrumentarium. First, suppliers require FDA approval to begin marketing a critical care monitor or to introduce a new model. The product development and approval process is costly and time-consuming. Second, vendor reputation is an important factor in effectively selling critical care monitors. Hospitals and other healthcare facilities rely on critical care monitors when treating patients that are in serious condition and are reluctant to purchase from suppliers, such as new entrants or fringe firms, whose products are not well known. Third, it takes substantial time and resources to develop the expertise necessary to successfully produce and market critical care monitors. Vendors must also maintain significant ongoing research and development efforts to continue innovations that meet customer demand as well as stringent safety standards. Finally, suppliers of critical care monitors must go through the costly and time-consuming process of establishing extensive sales and service networks. Customers rely on sales representatives to inform them about new products and technologies. Many hospitals and other healthcare facilities also rely on critical care monitor providers for service and are reluctant to purchase from vendors without an established presence and service network in their area.

2. Orthopedic-Vascular C-Arms

a. *Description of the Market.* The Complaint alleges that orthopedic-vascular C-arms are a separate and distinct product market for purposes of Section 7 of the Clayton Act, 15 U.S.C. 18. C-arms are fluoroscopic x-ray devices that offer real-time, continuous images during certain medical and surgical procedures. C-arms may be mobile ("mobile C-arms"), stationary ("fixed C-arms"), or small ("mini C-

arms"). Mobile C-arms typically consist of two wheeled units, one to support the C-arm unit and the other to support the display monitors and imaging processor. The C-arm unit consists of a curved arm with an x-ray tube mounted on one end and an image intensifier, which converts the x-rays into a viewable image, on the other end. Orthopedic-vascular C-arms are mobile C-arms designed for general surgery, orthopedic, pain management, or basic vascular procedures. These procedures include, but are not limited to, placing splints, localized needle biopsy, endoscopy, colonoscopy, and basic vascular procedures, such as balloon angiography and endovascular stent graphs.

A hospital or other healthcare facility seeking to purchase an orthopedic-vascular C-arm would not consider any other imaging equipment, such as a fixed C-arm, mini C-arm, CT scanner, or other x-ray equipment, to be a realistic substitute. Fixed C-arms are dedicated to a specific room, are generally used for cardiac procedures, and cost significantly more than any mobile C-arm. Mini C-arms cannot image an entire torso and are limited in the medical procedures in which they can be used. CT scanners and other x-ray equipment do not have the functionality to provide real-time, continuous viewing during medical procedures.

Another type of mobile C-arm is designed for advanced vascular and cardiac procedures. These mobile C-arms are designed to image a beating heart or the brain. To produce a good image, these mobile C-arms are equipped with greater hardware and functionality and are therefore priced at much higher levels than orthopedic-vascular C-arms. A hospital or other healthcare facility seeking to purchase an orthopedic-vascular C-arm would not consider a mobile C-arm designed for advanced vascular and cardiac procedures to be a realistic substitute. A small but significant increase in the price of an orthopedic-vascular C-arm would not cause a sufficient number of hospitals or other healthcare facilities seeking to purchase orthopedic-vascular C-arms to switch to any alternative products so as to make such a price increase unprofitable and unsustainable.

The Complaint alleges that the relevant geographic market for the sale of orthopedic-vascular C-arms is the United States. Any company seeking to sell an orthopedic-vascular C-arm in the United States must register with the FDA and receive approval for its products. To be competitive, an orthopedic-vascular C-arm supplier must also establish local distribution,

service, and support networks. Thus, in the face of a small but significant increase in the price of orthopedic-vascular C-arms, purchasers in the United States cannot turn to any producer of orthopedic-vascular C-arms that has not received FDA approval for its products, and are unlikely to turn in substantial numbers to providers that have not established a sales and service presence in the United States.

b. *Harm to Competition as a Consequence of the Acquisition.* The market for orthopedic-vascular C-arms is highly concentrated. GE dominates the sale of orthopedic-vascular C-arms, with approximately 68 percent of unit sales. Instrumentarium and two other firms have smaller market shares. The market for orthopedic-vascular C-arms would become even more concentrated if GE acquired Instrumentarium.

Orthopedic-vascular C-arms are differentiated on the basis of image quality, ease of use, weight and size, firm reputation, and service. Customers negotiate transactions individually with one or more vendors and have distinct and ranging preferences for certain products and vendors. The Complaint alleges that Instrumentarium provides GE with significant competition in the development, manufacture, and sale of orthopedic-vascular C-arms. This has included competition on price, service, innovation, and product features, such as image quality. A significant number of customers view the GE and Instrumentarium orthopedic-vascular C-arm products as close substitutes, and do not view the products of other vendors to be equally close. During individual negotiations, these customers have benefited from the competition between GE and Instrumentarium to obtain lower prices, improved product quality and services, and better contract terms. The proposed transaction would eliminate the competition between GE and Instrumentarium, remove one of the few vendors providing competition to GE in orthopedic-vascular C-arm sales, and substantially increase the likelihood that GE will unilaterally increase the price of orthopedic-vascular C-arms to a significant number of customers.

If GE acquires Instrumentarium, there is unlikely to be timely entry by any firm that would be sufficient to defeat an anticompetitive price increase or reduction in product quality. Successful entry and expansion is difficult, time-consuming, and costly for several reasons. First, to sell an orthopedic-vascular C-arm to a customer in the United States, a firm must gain FDA approval. The product development and approval process is costly and time-consuming. Second, a vendor's

reputation and name recognition are extremely important factors in effectively selling orthopedic-vascular C-arms; hospitals and healthcare facilities seek to purchase products with proven records of reliability, in no small part because mobile C-arms are used during important medical procedures, and a mobile C-arm's poor performance is costly and can endanger a patient's life or physical condition.

Third, because hospitals and other healthcare facilities rely on visits from sales representatives to learn about new products and technologies, and often rely on vendors for product service, a prospective supplier of orthopedic-vascular C-arms would have to establish sales, distribution, and service networks. Fourth, it takes substantial time and resources to develop the expertise necessary to successfully produce and market orthopedic-vascular C-arms. Suppliers must also maintain significant ongoing research and develop efforts to continue innovations that meet customer demand as well as stringent safety standards to ensure future sales.

II. Explanation of the Proposed Final Judgment

The provisions of the proposed Final Judgment are designed to eliminate the anticompetitive effects of GE's proposed acquisition of Instrumentarium in the critical care monitor and orthopedic-vascular C-arm markets by establishing a new, independent, economically viable competitor in each of those markets.

The proposed Final Judgment orders the defendants to divest the Spacelabs and Ziehm businesses to acquirers acceptable to the United States, in its sole discretion. The defendants must complete the required divestitures within one hundred twenty (120) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later. The United States, in its sole discretion, may agree to an extension of this time period of up to two, thirty (30) days periods, not to exceed sixty (60) calendar days in total.

Because GE and Instrumentarium have significant operations in Europe as well as the United States, the European Commission also reviewed GE's proposed acquisition of Instrumentarium. To obtain regulatory approval in Europe, GE entered into Commitments that, among other things, required it to sell its Spacelabs patient monitor business. These Commitments, approved by the European Commission on September 2, 2003 ("the EC

Commitments”), included a detailed description of the Spacelab business.

The proposed Final Judgment adopts this detailed description as the definition of the Spacelabs business to be divested and attaches the description as Exhibit 1 to the proposed Final Judgment. Because this detailed description includes highly confidential information, such as customer lists and supply agreements, it was filed under seal. A nonconfidential version of the description was filed as Exhibit 2 to the proposed Final Judgment. There is, however, one addition to the description of the Spacelabs business to be divested. The proposed Final Judgment also provides that the acquirer of the Spacelabs business shall grant GE a limited license to certain technology to be divested, so that Instrumentarium can continue to use this technology in its connectors for patient monitoring equipment. The terms and duration of such license are to be negotiated between GE and the acquirer of the Spacelabs business. The proposed Final Judgment does not require GE to divest Datex-Ohmeda, another Instrumentarium business unit that manufactures and sells patient monitors, because that unit predominately sells patient monitors other than critical care monitors.

If the defendants have not divested the Spacelabs business within the required time period, the Court, upon application of the United States, is to appoint a trustee to complete the divestiture. Because the Commitments entered into in Europe also require selection of a trustee if GE does not complete the divestitures within a certain time, the proposed Final Judgment provides that the United States shall select a trustee, to be approved by the Court, after good-faith consultation with the European Commission to ensure selection of a trustee acceptable to both the United States and the European Commission. The proposed Final Judgment provides that the defendants will pay all costs and expenses of the trustee. After the trustee's appointment becomes effective, the trustee will file monthly reports with the United States and the Court, setting forth the trustee's efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the plaintiff will have the opportunity to make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust and the term of the trustee's appointment by a period requested by the United States.

The proposed Final Judgment defines the Ziehm business to be divested as Instrumentarium's C-arm business and its line of C-arm products, currently conducted through two subsidiaries: Instrumentarium Imaging Ziehm, Inc. and Instrumentarium Imaging Ziehm GmbH. The business to be divested includes, with a few limited exceptions, all tangible and intangible assets used in Instrumentarium's C-arm business. These assets include two physical facilities (located in Riverside, California and Nuremberg, Germany), all contracts and agreements, and all intellectual property, except the use of the name “Instrumentarium.” The proposed Final Judgment has a separate provision with regard to an Instrumentarium 3D-imaging research and development project that was conducted for Instrumentarium's other imaging businesses, as well as for its C-arm business. This ongoing 3D project is not part of the divestiture package, but the proposed Final Judgment requires the defendants to (1) maintain the project; (2) continue it for up to one year on a joint basis with the acquirer of Ziehm; and (3) grant the acquirer of Ziehm a perpetual, assignable, royalty-free nonexclusive license, limited to the field of use of C-arms, to the intellectual property relating to 3D-imaging developed in the project during that period.

If the defendants have not divested the Ziehm business within the required time period, the Court, upon application of the United States, is to appoint a trustee selected by the United States and approved by the Court to complete the divestiture. The proposed Final Judgment provides that the defendants will pay all costs and expenses of the trustee. After the trustee's appointment becomes effective, the trustee will file monthly reports with the United States and the Court, setting forth the trustee's efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the plaintiff will have the opportunity to make recommendations to the Court, which shall enter such orders as appropriate to carry out the purpose of the trust, including extending the trust and the term of the trustee's appointment by a period requested by the United States.

The proposed Final Judgment takes steps to ensure that the acquirers of both the SpaceLabs and Ziehm businesses can and will be able to use these operations as viable, ongoing businesses in the manufacture and sale of critical care monitors and orthopedic-vascular C-arms, respectively, in the United States. The United States, in its sole

discretion, must be satisfied that both the Spacelabs and Ziehm acquirers have the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the manufacture and sale of critical care monitors and orthopedic-vascular C-arms, respectively, in the United States.

The proposed Final Judgment is thus designed to maintain the present level of competition in both the critical care monitor and orthopedic-vascular C-arm markets by replacing the competitor eliminated in each of these markets as a result of the acquisition with equally viable and effective competitors. It accomplishes this goal by, among other things: (1) Requiring prompt divestitures so that the viability of the Spacelabs and Ziehm businesses is not harmed by an unreasonable delay in accomplishing those divestitures; (2) requiring divestitures of the tangible and intangible assets that make up each of the divested businesses so that the acquirers have the assets needed to make Spacelabs and Ziehm viable, competitive businesses; and (3) ensuring that the acquirers of Spacelabs and Ziehm have the intent and capability of competing effectively in the manufacture and sale of critical care monitors and orthopedic-vascular C-arms, respectively, in the United States.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in a federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent lawsuit that any private party may bring against the defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the Tunney Act, provided that the United States has not withdrawn its consent. The Tunney Act conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The Tunney Act provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**. Written comments should be submitted to: James R. Wade, Chief, Litigation III Section, Antitrust Division, United States Department of Justice, 325 Seventh Street, NW., Suite 300, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court of any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to The Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against GE's acquisition of Instrumentarium. However, the United States is satisfied that the divestiture of the assets specified in the proposed Final Judgment will preserve competition in the production and sale of critical care monitors and orthopedic-vascular C-arms. The divestitures will preserve the structure of the markets that existed prior to the acquisition and will preserve the existence of independent competitors.

VII. Standard of Review Under the Tunney Act for the Proposed Final Judgment

The Tunney Act requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the Court may consider:

(1) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) The impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e). As the United States Court of Appeals for the D.C. Circuit held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft*, 56 F.3d 1448, 1461–62 (D.C. Cir. 1995).

In conducting this inquiry, "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).¹ Rather, [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-Am. Dairymen, Inc., 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. May 17, 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v.*

¹ *See also United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved (was) within the reaches of the public interest"). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the Tunney Act. Although the Act authorizes the use of additional procedures, 15 U.S.C. 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93–1463, 93rd Cong., 2d Sess. 8–9 (1974), reprinted in 1974 U.S.C.A.N. 6535, 6538.

Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460–62. Case law requires that

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).²

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

Moreover, the Court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that

² *CF. BNS*, 858 F.2d at 463 (holding that the court's "ultimate authority under the [Tunney] Act is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass") *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

“the court is only authorized to review the decree itself,” and not to “effectively redraft the complaint” to inquire into other matters that the United States might have but did not pursue. *Id.* at 1459–60.

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the Tunney Act that were considered by the United States in formulating the proposed Final Judgment.

Dated: October 30, 2003.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that a copy of the Competitive Impact Statement was served on the following counsel by electronic mail in PDF format or hand delivery, this 30th day of October 2003:

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[FR Doc. 03-28282 Filed 11-10-03; 8:45 am]

BILLING CODE 4410-11-M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—The Digital Subscriber Line Forum

Notice is hereby given that, on September 26, 2003, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (“the Act”), The Digital Subscriber Line Forum (“DSL”) has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purchase of extending the Act’s provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, 1-800 FAST DSL, La Jolla, CA; Be Connected Ltd., Rosh Ha’ayin, ISRAEL; Coppergate Communications, Tel Aviv, ISRAEL; EANTIC, Berlin,

GERMANY; Flextronics, Johannesburg, SOUTH AFRICA; ITRI, Chutung, Hsinchu, TAIWAN; Marcoin Communications, Coventry, UNITED KINGDOM; NTCA, Arlington, VA; Operax AB, Lulea, SWEDEN; Serconet, Southborough, MA; SupportSoft, Redwood City, CA; Taicom International Inc., Fremont, CA; and Telecordia Technologies, Morristown, NJ, have been added as parties to this venture. Sonera Corporation is now TeliaSonera AB, Helsinki, FINLAND.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and DSL intends to file additional written notifications disclosing all changes in membership.

On May 15, 1995, DSL filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 25, 1995 (60 FR 38058).

The last notification was filed with the Department on July 16, 2003. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on August 15, 2003 (68 FR 48940).

Dorothy B. Fountian,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 03-28245 Filed 11-10-03; 8:45 am]

BILLING CODE 4410-11-M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—DVD Copy Control Association

Notice is hereby given that, on October 8, 2003, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (“the Act”), DVD Copy Control Association (“DVD CCA”) has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act’s provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Accesstek, Inc., Hsinchu, TAIWAN; Advanced Media Technology Co., Ltd., Seongnam-City, REPUBLIC OF KOREA; Boston Acoustics, Inc., Peabody, MA; Broadcom Corporation, Irvine, CA; Feng Sheng Technology Co., Ltd., Taipei Hsien, TAIWAN;

Guangdong Kwanloon Electronics and Technology Co., Ltd., Shenzhen, PEOPLE’S REPUBLIC OF CHINA; Hanbit System Co., Ltd., Kyonggi-do, REPUBLIC OF KOREA; Harvests Multimedia Pte Ltd., Singapore, SINGAPORE; ims international media service spa, Varese, ITALY; Jiangsu Syber Electronic Co., Ltd., Zhenjiang, PEOPLE’S REPUBLIC OF CHINA; Kent Worldco., Ltd., Taipei, TAIWAN; Media Mastering Services, LLC., Brea, CA; Media Solutions, Paris, FRANCE; New York Nickel LLC, Bohemia, NY; Nexphil Electronics Co., Ltd., Seoul, REPUBLIC OF KOREA; OPT Corporation, Nagano-ken, JAPAN; PitsExpert Technology Co., Ltd., Taipei, TAIWAN; PrediWave Corporation, Fremont, CA; Primare Systems AB, Vaxjo, SWEDEN; Shenzhen Contel Electronics Technology Co., Ltd., Shenzhen, PEOPLE’S REPUBLIC OF CHINA; SOHO Tech Village, Ltd., Eastlake, OH; and Techsan I&C Co., Pyeongtaek-Si, REPUBLIC OF KOREA have been added as parties to this venture.

Also, Aralion Inc., Seoul, REPUBLIC OF KOREA; Cyrus Electronics Ltd., Cambridge, UNITED KINGDOM; E&S Electronics Co., Ltd., Seoul, REPUBLIC OF KOREA; EMI Operations Italy S.p.A., Caronno Pertusella, ITALY; Electric Switch Limited, London, UNITED KINGDOM; Infineon Technologies Corporation, San Jose, CA; Macro Image Technology, Inc., Seoul, REPUBLIC OF KOREA; Songpagu, Seoul, REPUBLIC OF KOREA; MicroPious Co., Ltd., Pyeongtaek-Si, REPUBLIC OF KOREA; Musion Co., Ltd., Seoul, REPUBLIC OF KOREA; Nakamichi Corporation, Tokyo, JAPAN; Prochips Technology, Seoul, REPUBLIC OF KOREA; and UP Technology, Seoul, REPUBLIC OF KOREA have dropped as parties to this venture. In addition, Delux Video has changed its name to Deluxe Media Services, Inc., Vernon Hills, IL; Dongguan Albatronics (Far East) Electronics Co., Ltd. has changed its name to Dongguan Great Vision Technology Ltd., Guangdong, PEOPLE’S REPUBLIC OF CHINA; and Shenzhen Landel Electronics Technology Co., Ltd. has changed its name to Shenzhen Contel Electronics Technology Co., Ltd., Shenzhen, PEOPLE’S REPUBLIC OF CHINA.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and DVD CCA intends to file additional written notification disclosing all changes in membership.

On April 11, 2001, DVD CCA filed its original notification pursuant to Section

6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on August 3, 2001 (66 FR 40727).

The last notification was filed with the Department on July 2, 2003. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on August 4, 2003 (68 FR 45854).

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 03-28284 Filed 11-10-03; 8:45 am]

BILLING CODE 4410-11-M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—The National Center for Manufacturing Sciences, Inc.

Notice is hereby given that, on October 15, 2003, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), The National Center for Manufacturing Sciences, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Anautics, Inc., Oklahoma City, OK; BCT Technology, Inc., Willstaett, GERMANY; Cohesia Corporation, Mason, OH; Collins & Aikman Corporation, Troy, MI; FIATECH, Austin, TX; Fidelis Security Systems, Inc., Bethesda, MD; Henkel Electronic, Conductive Die Attach Division, City of Industry, CA; PPG Industries, Cleveland, OH and Siemens AG, Orlando, FL have been added as parties to this venture.

The following companies have resigned or had their membership in NCMS terminated: Impact Engineering, Jackson, MI; Industrial Technology Centre, Winnipeg, Manitoba, CANADA; and Motorsoft, Lebanon, OH.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and The National Center for Manufacturing Sciences, Inc. intends to file additional written notification disclosing all changes in membership.

On February 20, 1987, The National Center for Manufacturing Sciences, Inc.

filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 17, 1987 (52 FR 8375).

The last notification was filed with the Department on July 30, 2003. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on August 15, 2003 (68 FR 48941).

Dorothy Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 03-28246 Filed 11-10-03; 8:45 am]

BILLING CODE 4410-11-M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—National Shipbuilding Research Program

Notice is hereby given that, on October 9, 2003, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Advanced Technology Institute has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in the project status of the National Shipbuilding Research Program ("NSRP"). The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, the general area of planned activity of the NSRP is to establish collaborative research efforts of limited duration to manage and focus national shipbuilding research and development funding on technologies that will reduce the cost of warships to the Navy, and establish U.S. international shipbuilding competitiveness. This includes the assessment of product design and material technologies, and provides a collaborative forum to improve business and acquisition processes. In addition to the member shipyards, some research and development work under the collaboration's charter may include the participation of other companies, universities and government personnel.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Advanced Technology Institute intends to file additional written notification disclosing all changes in membership.

On March 13, 1998, Advanced Technology Institute filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act of January 29, 1999 (64 FR 4708).

The last notification was filed with the Department on September 12, 2003. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on October 6, 2003 (68 FR 57709).

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 03-28244 Filed 11-10-03; 8:45 am]

BILLING CODE 4410-11-M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Optical Internetworking Forum

Notice is hereby given that, on October 14, 2003, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Optical Internetworking Forum has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Analogix Semiconductor, Santa Clara, CA; Circadian Systems, Allentown, PA; Civcom, Petah-Tikva, ISRAEL; Diablo Technologies, Gatineau, Quebec, CANADA; Ibsiden, Gifu, JAPAN; KeyEye Communication, Sacramento, CA; Lambda Optical Systems, Holmdel, NJ; Quellan, Atlanta, GA; Foxconn, Harrisburg, PA; China Academy of Telecommunication Research, Beijing, PEOPLE'S REPUBLIC OF CHINA; Georgia Institute of Technology, Atlanta, GA; and University of New Hampshire, Durham, NH have been added as parties to this venture.

Also, Interintelligence, Torrance, CA; Movaz Networks, McLean, VA; Network Elements, Beaverton, OR; Philips Semiconductors, Eindhoven, THE NETHERLANDS; Sierra Monolithics, Redondo Beach, CA; Spirent, Honolulu, HI; STMicroelectronics, Nepean, Ontario, CANADA; Teradian Networks, San Jose, CA; T-Networks, Allentown, PA; Transpectrum, Los Angeles, CA; Tsunami Photonics, Dun Laoghaire,

IRELAND; Wavecrest, Eden Prairie, MN; Xelerated, Stockholm, SWEDEN; and Zarlink, San Diego, CA have been dropped as parties to this venture. Multilink Technology, Somerset, NJ has merged into Vitesse Semiconductor, Camarillo, CA.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Optical Internetworking Forum intends to file additional written notification disclosing all changes in membership.

On October 5, 1998, Optical Internetworking Forum filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on January 29, 1999 (64 FR 4709).

The last notification was filed with the Department on July 23, 2003. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on August 29, 2003 (68 FR 52056).

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 03-28285 Filed 11-10-03; 8:45 am]

BILLING CODE 4410-11-M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Spoken Dialogue Interfaces for Cars

Notice is hereby given that, on October 3, 2003, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Spoken Dialogue Interfaces for Cars has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, The Board of Trustees of the Leland Stanford Junior University, Palo Alto, CA; and SRI-International, Speech Technology and Research Lab, Menlo Park, CA have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Spoken

Dialogue Interfaces for Cars intends to file additional written notification disclosing all changes in membership.

On July 4, 2003, Spoken Dialogue Interfaces for Cars filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on September 8, 2003 (68 FR 52959).

Dorothy B. Fountain,

Deputy Director of Operations Antitrust Division.

[FR Doc. 03-28287 Filed 11-10-03; 8:45 am]

BILLING CODE 4410-11-M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—VSI Alliance

Notice is hereby given that, on October 10, 2003, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), VSI Alliance has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Richard Brown (individual member), Ann Arbor, MI; Ramesh Chandra (individual member), San Diego, CA; LTRIM Technologies, Inc., Laval, Quebec, CANADA; Michael McCorquodale (individual member), Ann Arbor, MI; Morpho Technologies, Irvine, CA; and Signal Technologies AG, Unterhaching, GERMANY have been added as parties to this venture.

Also, 0-In Design Automation, Inc., San Jose, CA; Beijing Hongsi Electronic Technology Co., Ltd., Hai Dian, PEOPLE'S REPUBLIC OF CHINA; Global UniChip Corp., Hsinchu Science Park, TAIWAN; Intellitech Corp., Durham, NH; NOKIA, Tokyo, JAPAN; NurLogic Design, Inc., San Diego, CA; Cyril Rayan (individual member), San Jose, CA; and X-Vein, Tokyo, JAPAN have been dropped as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and VSI Alliance intends to file additional written notification disclosing all changes in membership.

On November 29, 1996, VSI Alliance filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 4, 1997 (62 FR 9812).

The last notification was filed with the Department on July 9, 2003. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on August 29, 2003 (68 FR 44367).

Dorothy B. Fountain,

Deputy Director of Operations Antitrust Division.

[FR Doc. 03-28286 Filed 11-10-03; 8:45 am]

BILLING CODE 4410-11-M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—XSEC Consortium

Notice is hereby given that, on October 1, 2003, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), XSEC Consortium has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiff to actual damages under specified circumstances. Pursuant to Section 6(b) of the Act, the identities of the parties are Varian Medical Systems, Inc., Mountain View, CA; and Palo Alto Research Center (PARC), Palo Alto, CA. The nature and objectives of the venture are to develop two types of novel, high performance, low cost x-ray detectors, first for diffraction scanning of checked bags for explosives and contraband, and second for computed tomography (CT) scanning of large seaborne cargo containers. The first type of detector will be a flat panel photoconductor x-ray detector of approximate area 5 cm x 25 cm capable of detecting individual x-ray photons and measuring their energy. These detectors will be used to build a subscale laboratory test apparatus for a diffraction-based explosive detector suitable for later scale-up to a size appropriate for airport screening of checked bags. The second type of detector will be a large area thin film transistor (TFT) panel detector for detecting the flux or x-ray photons incident upon it but without energy

measurement capability. Here the requirement is to produce TFT panels at sufficiently low cost to enable very large detectors several meters in extent to be assembled for CT scanning of cargo containers. Jet printing techniques will be developed to enable wax masks to be used during fabrication of the TFT arrays to reduce their manufacturing cost.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 03-28283 Filed 11-10-03; 8:45 am]

BILLING CODE 4410-11-M

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Proposed Extension of Information Collection Request Submitted for Public Comment; Petition for Finding Under Section 3(40) of ERISA

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employee Benefits Security Administration is soliciting comments on the proposed extension of the Petition for Finding under Section 3(40) of ERISA.

A copy of the information collection request (ICR) can be obtained by contacting the individual shown in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office shown in the Addresses section on or before January 12, 2004.

ADDRESSES: Gerald B. Lindrew, Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Washington, DC 20210, (202) 693-8410, FAX (202)

693-4745 (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION:

I. Background

Rules codified beginning at 29 CFR 2570.150 set forth an administrative procedure ("procedural rules") for obtaining a determination by the Secretary of Labor (Secretary) as to whether a particular employee benefit plan is established or maintained under or pursuant to one or more agreements that are collective bargaining agreements for purposes of section 3(40) of the Employee Retirement Income Security Act of 1974 (ERISA). These procedural rules relate to specific criteria set forth in 29 CFR 2510.3-40 ("criteria rules") that if met constitute a finding by the Secretary that a plan is maintained under or pursuant to one or more collective bargaining agreements. Employee benefit plans that meet the requirements of the criteria rules are generally excluded from the definition of "multiple employer welfare arrangements" under section 3(40) and are consequently not subject to state regulation. These rules were generally effective on April 9, 2003.

The procedure that includes the ICR is available only in situations where the jurisdiction or law of a state has been asserted against an entity that it meets the exception for plans established or maintained under or pursuant to one or more collective bargaining agreements and is, as a result, subject to state law.

II. Review Focus

The Department of Labor (Department) is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions

The Office of Management and Budget's (OMB) approval of this ICR will expire on January 31, 2004. After considering comments received in response to this notice, the Department intends to submit the ICR to OMB for continuing approval. No change to the existing ICR is proposed or made at this time.

Employee Benefits Security Administration, Department of Labor.

Title: Petition for Finding under Section 3(40) of ERISA.

Type of Review: Extension of a currently approved collection of information.

OMB Number: 1210-0119.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions.

Respondents: 45.

Responses: 45.

Estimated Total Burden Hours: 1.

Estimated Total Burden Cost (Operating and Maintenance): \$104,100.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection request; they will also become a matter of public record.

Dated: November 6, 2003.

Gerald B. Lindrew,

Deputy Director, Office of Policy and Research, Employee Benefits Security Administration.

[FR Doc. 03-28299 Filed 11-10-03; 8:45 am]

BILLING CODE 4510-29-P

DEPARTMENT OF LABOR

Employment and Training Administration

Labor Certification Process for Temporary Agricultural Employment of Nonimmigrant Workers in the United States (H-2A Workers); H-2A On-line Application Processing System; Formal Briefing

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice

SUMMARY: As the result of the General Accounting Office (GAO) recommendation to the Secretary of Labor on ways to improve the H-2A Program, the Department of Labor (DOL) has designed an H-2A case management system to improve data tracking and reporting capabilities. The system will also provide a user-friendly platform for the Regional Office staff and the regulated community to enter application data. The Division of

Foreign Labor Certification, Employment and Training Administration (ETA), Department of Labor, announces a formal briefing to demonstrate to agricultural employers and the interested parties the new On-Line Application Processing System. The briefing will allow ETA to demonstrate to the regulated community, *i.e.*, employers, attorneys, agents and associations, the benefits of the online application completion module.

DATES: The briefing date is: Friday, December 5, 2003; 9:30 a.m. to 4 p.m., Monterey, CA.

Notices of intention to appear at the briefing must be postmarked no later than November 26, 2003.

ADDRESSES: The briefing location is: Hilton Monterey, 1000 Oguajito road, Monterey, CA 93940

Send notices of intention to appear to: Charlene Giles, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4318, Washington, DC 20210. Notice also may be faxed to Charlene Giles at 202-693-2769 (this is not a toll-free number), or submitted by e-mail at dflc.onp@dol.gov.

ADDITIONAL BRIEFINGS: In the near future, the Division of Foreign Labor Certification, Employment and Training Administration (ETA), Department of Labor, will announce additional locations for formal briefings to be held on the East Coast in January 2004.

FOR FURTHER INFORMATION CONTACT: Charlene Giles; telephone 202-693-2950. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: The information public briefings will be chaired by a senior official of the Employment and Training Administration. Persons appearing at the briefings will be allowed a hands on experience with the system and to pose questions to Department staff.

Signed at Washington, DC, this 5th day of November, 2003.

Emily Stover DeRocco,

Assistant Secretary for Employment and Training.

[FR Doc. 03-28297 Filed 11-10-03; 8:45 am]

BILLING CODE 4510-30-M

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce

paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed reinstatement of the Work Schedules Supplement to the Current Population Survey (CPS), to be conducted in May 2004. A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section of this notice on or before January 12, 2004.

ADDRESSES: Send comments to Amy A. Hobby, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue, NE., Washington, DC 20212, telephone number 202-691-7628 (this is not a toll free number).

FOR FURTHER INFORMATION CONTACT: Amy A. Hobby, BLS Clearance Officer, telephone number 202-691-7628. (See **ADDRESSES** section).

SUPPLEMENTARY INFORMATION:

I. Background

The CPS has been the principal source of the official Government statistics on employment and unemployed for over 50 years. Collection of labor force data through the CPS is necessary to meet the requirements in title 29, United States Code, sections 1 and 2. Over the past several decades, the economy of the United States has been undergoing a fundamental restructuring. Advances in computer and communications technology have increasingly enabled some workers to perform part or all of their work at home. The growth of this phenomenon represents an important development in this country's labor markets. This supplement will provide a substantial and objective set of data about work at home and work in home-based businesses. It will provide valuable information on the work schedules of employed persons, that is,

the beginning and ending times of work, type of shift worked, and calendar days worked. It also will provide information about employed persons who do work at home. Work schedule supplements have been conducted since the 1970s.

Questions on home-based work were included in May 1985, May 1991, May 1997, and May 2001. A key purpose of the May 2004 supplement is to gather updated information on these topics. The May 2004 supplement will provide information that will help researchers gauge the extent to which the number of persons who work at home is expanding and will provide additional detail on the nature of this work activity. More generally, the May 2004 supplement will be used by BLS researchers and others to examine the changes in work schedules and work at home that are taking place over time.

II. Desired Focus of Comments

The Bureau of Labor Statistics is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

III. Current Action

OMB clearance is being sought for the Work Schedules Supplement to the CPS.

Type of Review: Reinstatement, with change, of a previously approved collection for which approval has expired.

Agency: Bureau of Labor Statistics.

Title: Work Schedules Supplement to the CPS:

OMB Number: 1220-0119.

Affected Public: Households.

Total Respondents: 58,000.

Frequency: Occasional.

Total Responses: 58,000.

Average Time Per Response: 4.5 Minutes.

Estimated Total Burden Hours: 4,3250 hours.

Total Burden Cost (capital/startup): \$0.

Total Burden Cost (operating/maintenance): \$0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 3rd day of November, 2003.

Cathy Kazanowski,

*Chief, Division of Management Systems,
Bureau of Labor Statistics.*

[FR Doc. 03-28298 Filed 11-10-03; 8:45 am]

BILLING CODE 4510-24-M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification

The following parties have filed petitions to modify the application of existing safety standards under section 101(c) of the Federal Mine Safety and Health Act of 1977.

1. Hoffmann, Inc.

[Docket No. M-2003-076-C]

Hoffmann, Inc., 6001 49th Street South, Muscatine, Iowa 52761 has filed a petition to modify the application of 30 CFR 77.206(c) (Ladders; construction; installation and maintenance) to the Goals Coal Company's Goals Preparation Plant (MSHA I.D. No. 46-05317) located in Raleigh County, West Virginia. The petitioner is currently constructing a concrete silo at the Mine. The petitioner requests a modification of the standard to allow the use of ladder safety devices in lieu of backguards or ladder cages on temporary ladders installed for workers to access scaffold platforms during construction of the silo. The safety devices would consist of a full-body harness connected to an independent lifeline. Workers would be required to wear these devices while ascending or descending the ladders. The petitioner states that compliance with the existing standard is not feasible during construction of the silo, and the proposed alternative method would provide at least the same measure of protection as the existing standard.

2. Consolidation Coal Company

[Docket No. M-2003-077-C]

Consolidation Coal Company, 1800 Washington Road, Pittsburgh, Pennsylvania 15241-1421 has filed a

petition to modify the application of 30 CFR 75.507 (Power connection points) to its Robinson Run #95 Mine (MSHA I.D. No. 46-01318) located in Harrison County, West Virginia. The petitioner requests a modification of the existing standard to permit non-permissible submersible pumps to be installed in bleeder and return entries and sealed areas of the Robinson Run #95 Mine. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

3. Consol Pennsylvania Coal Company

[Docket No. M-2003-078-C]

Consol Pennsylvania Coal Company, 1800 Washington Road, Pittsburgh, Pennsylvania 15241-1421 has filed a petition to modify the application of 30 CFR 75.507 (Power connection points) to its Enlow Fork Mine (MSHA I.D. No. 36-07416) located in Greene County, Pennsylvania. The petitioner requests a modification of the existing standard to permit non-permissible submersible pumps to be installed in bleeder and return entries and sealed areas of the Enlow Fork Mine. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

4. Gladly Fork Mining, Inc.

[Docket No. M-2003-079-C]

Gladly Fork Mining, Inc., P.O. Box 430, Buckhannon, West Virginia 26201 has filed a petition to modify the application of 30 CFR 75.364(b)(4) (Weekly examination) to its Mine No. 1 (MSHA I.D. No. 46-01162) located in Upshur County, West Virginia. The petitioner proposes to use an alternative method to examine the air in certain areas of the return air course. The petitioner states that there are nine seals within approximately 1000 feet that would be unsafe to travel for examination due to fallen walkway and deteriorating roof conditions. The petitioner proposes to check the air going into seals on the intake side in 3 locations, and return 1 location of the affected area, and check the quality of air entering the seals at 3 locations and return 1 location on a daily basis until all production has ceased and all equipment has been removed from the mine. The petitioner states that all air will be directed to the main return within approximately 1000 feet of the main fan and that its proposed alternative method for the Mine No. 1 would exceed the existing standard.

5. KenAmerican Resources, Inc.

[Docket No. M-2003-080-C]

KenAmerican Resources, Inc., 7590 State Route 181, Central City, Kentucky 42330 has filed a petition to modify the application of 30 CFR 75.364(b)(2) (Weekly examination) to its Paradise #9 Mine (MSHA I.D. No. 15-17741) located in Muhlenberg County, Kentucky. The petitioner proposes to establish a Measuring Point Location in the Main East return at x-cut #10 (MPL 1B) and the ventilation entries at x-cut #7 (MPL C & D), and in the Main North return at x-cut #1. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

6. Bowie Resources Limited

[Docket No. M-2003-081-C]

Bowie Resources Limited, P.O. Box 483, Paonia, Colorado 81428 has filed a petition to modify the application of 30 CFR 75.1002 (Installation of electric equipment and conductors; permissibility) to its Bowie No. 3 Mine (MSHA I.D. No. 05-04758) located in Delta County, Colorado. The petitioner requests a modification of the existing standard to permit the use of high-voltage continuous miners in by the last open crosscut and within 150 feet of the pillar workings. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

Request for Comments

Persons interested in these petitions are encouraged to submit comments via e-mail to comments@msha.gov, or on a computer disk along with an original hard copy to the Office of Standards, Regulations, and Variances, Mine Safety and Health Administration, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209. All comments must be postmarked or received in that office on or before December 12, 2003. Copies of these petitions are available for inspection at that address.

Dated at Arlington, Virginia, this 5th day of November, 2003.

Marvin W. Nichols, Jr.,

*Director, Office of Standards, Regulations,
and Variances.*

[FR Doc. 03-28247 Filed 11-10-03; 8:45 am]

BILLING CODE 4510-43-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 03-145]

Return to Flight Task Group; Meeting

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, the National Aeronautics and Space Administration announces a meeting of the Return to Flight Task Group (RTFTG).

DATES: Thursday, December 11, 2003, from 9 a.m. until 11 a.m.

ADDRESSES: Nassau Bay Hilton, 3000 NASA Parkway, Houston, TX 77058

FOR FURTHER INFORMATION CONTACT: Mr. David M. Lengyel at (281) 792-7523.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the meeting room. Attendees will be requested to sign a register.

The agenda for the meeting is as follows:

- Welcome remarks from Chair;
- Status reports from Technical, Operations and Management Panel Chairs on NASA's implementation of all Columbia Accident Investigation Board return to flight findings/recommendations;
- Remarks from Editorial Sub-Panel;
- Action item summary from Executive Secretary; and
- Closing remarks from Chair.

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

June W. Edwards,

*Advisory Committee Management Officer,
National Aeronautics and Space Administration.*

[FR Doc. 03-28296 Filed 11-10-03; 8:45 am]

BILLING CODE 7510-01-P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

AGENCY: National Science Foundation.

ACTION: Submission for OMB Review; Comment Request.

SUMMARY: Under the Paperwork Reduction Act of 1995, Pub. L. 104-13 (44 U.S.C. 3501 et seq.), and as part of its continuing effort to reduce paperwork and respondent burden, the National Science Foundation (NSF) is

inviting the general public and other Federal agencies to comment on this proposed continuing information collection. This is the second notice for public comment; the first was published in the **Federal Register** at 68 FR 37866 and no comments were received. NSF is forwarding the proposed submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice.

DATES: Comments regarding these information collections are best assured of having their full effect if received by OMB within 30 days of publication in the **Federal Register**.

ADDRESSES: Written comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of NSF, including whether the information will have practical utility; (b) the accuracy of NSF's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; or (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725 17th Street, NW., Room 10235, Washington, DC 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230 or send email to splimpto@nsf.gov. Copies of the submission may be obtained by calling (703) 292-7556.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton, NSF Reports Clearance Officer at (703) 292-7556 or send e-mail to splimpto@nsf.gov.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

SUPPLEMENTARY INFORMATION:

Title of Collection: Generic Clearance of the Science Resources Statistics Survey Improvement Projects.

OMB Control No.: 3145-0174.

Abstract: The National Science Foundation's (NSF) Division of Science Resources Statistics (SRS) needs to collect timely data on constant changes in the science and technology sector and to provide the most complete and accurate information possible to policy makers in Congress and throughout government and academia. NSF/SRS conducts many surveys to obtain the data for these purposes. The Generic Clearance will be used to ensure that the highest quality data is obtained from these surveys. State-of-the-art methodology will be used to develop, evaluate, and test questionnaires as well as to improve survey methodology. This may include field or pilot tests of questions for future large-scale surveys, as needed.

Expected Respondents. The respondents will be from industry, academia, nonprofit organizations, members of the public, and Federal agencies. Respondents will be either individuals or institutions, depending upon the survey under investigation. Qualitative procedures will generally be conducted in person, but quantitative procedures may be conducted using the same mode as the survey under investigation. Up to 8,020 respondents will be contacted across all survey improvement projects. No respondent will be contacted more than twice in one year under this generic clearance. Every effort will be made to use technology to limit the burden on respondents from small entities.

Both qualitative and quantitative methods will be used to improve NSF's current data collection instruments and processes and to reduce respondent burden, as well as to develop new surveys. Qualitative methods include, but are not limited to, expert review; exploratory, cognitive, and usability interviews; focus groups; and respondent debriefings. Cognitive and usability interviews may include the use of scenarios, paraphrasing, card sorts, vignette classifications, and rating tasks. Quantitative methods include, but are not limited to, behavior coding, split panel tests, and field tests.

Information being collected is not considered sensitive. In general, assurances of data confidentiality will not be provided to respondents in the pretests. Instead, respondents have the option of requesting that any and all data they provide be kept confidential.

Use of the Information. The purpose of these studies is to use the latest and most appropriate methodology to improve NSF surveys. The data will be used internally to improve NSF surveys. Methodological findings may be presented externally in technical papers

at conferences, published in the proceedings of conferences, or in journals. Improved NSF surveys will help policy makers in decisions on research and development funding,

graduate education, scientific and technical workforce, regulations, and reporting guidelines, as well as contributing to reduced survey costs.

Burden on the Public. NSF estimates that a total reporting and recordkeeping burden of 11,200 hours will result from pretesting to improve its surveys. The calculation is:

TABLE 1.—ANTICIPATED SURVEYS TO UNDERTAKE IMPROVEMENT PROJECTS, ALONG WITH THE NUMBER OF RESPONDENTS AND BURDEN HOURS PER SURVEY

Survey name	Number of respondents ¹	Hours
Graduate Student Survey	² 15,500	31,500
Sestat Surveys	5,000	5,000
New Postdoc Survey	800	1,000
New and Redesigned R&D Surveys:		
Academic R&D	600	600
Government R&D	50	50
Nonprofit R&D	200	100
Industry R&D	500	1,000
Survey of Scientific & Engineering Facilities	300	150
Instrumentation	150	300
Public Understanding of S&E Surveys	200	50
Scientific Publications	120	250
Additional surveys not specified	400	1,200
Total	23,820	41,200
Graduate Student Survey	500	1,500
Sestat Surveys	5,000	5,000
New Postdoc Survey	800	1,000
New and Redesigned R&D Surveys:		
Academic R&D	600	600
Government R&D	50	50
Nonprofit R&D	200	100
Industry R&D	500	1,000
Survey of Scientific & Engineering Facilities	300	150
Instrumentation	150	300
Public Understanding of S&E Surveys	200	50
Scientific Publications	120	250
Additional surveys not specified	400	1,200
Total	8,820	11,200

¹ Number of respondents listed for any individual survey may represent several methodological improvement projects.

² This number refers to the science and engineering departments within the academic institutions of the United States (not the academic institutions themselves). This number is large enough to accommodate a split panel test of this survey.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: November 5, 2003.

Suzanne Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 03-28276 Filed 11-10-03; 8:45 am]

BILLING CODE 7555-01-M

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act; Notice of Meeting

TIME: 9 a.m., Tuesday, November 18, 2003.

PLACE: NTSB Conference Center, 429 L'Enfant Plaza SW, Washington, DC 20594.

STATUS: The two items are open to the public.

MATTERS TO BE CONSIDERED:

5299K—Most Wanted Safety Recommendations Program—November 2003 Update on Federal Issues.

7602—Aviation Accident Report—Crash of an Aviation Charter, Inc., Raytheon (Beechcraft) King Air A100, N41BE, near Eveleth, Minnesota, on October 25, 2002.

NEWS MEDIA CONTACT: Telephone: (202) 314-6100.

Individuals requesting specific accommodations should contact Ms. Carolyn Dargan at (202) 314-6305 by Friday, November 14, 2003.

FOR FURTHER INFORMATION CONTACT: Vicky D'Onofrio, (202) 314-6410.

Dated: November 7, 2003.

Vicky D'Onofrio,

Federal Register Liaison Officer.

[FR Doc. 03-28432 Filed 11-7-03; 1:22 pm]

BILLING CODE 7533-01-M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-245, 50-336, and 50-423]

Dominion Nuclear Connecticut, Inc., Millstone Power Station, Unit Nos. 1, 2, and 3; Notice of Consideration of Approval of Application Regarding Proposed Corporate Restructuring and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission or NRC) is considering the issuance of an order under 10 CFR 50.80 approving the indirect transfer of Facility Operating Licenses Nos. DPR-21, DPR-65, and

NPF-49 for the Millstone Power Station, Unit Nos. 1, 2, and 3 (Millstone), respectively, to the extent held by Dominion Nuclear Connecticut, Inc. (DNC). DNC is a wholly-owned, indirect subsidiary of Dominion Resources, Inc. (DRI), the ultimate parent of DNC. The proposed changes would result from a corporate realignment involving several steps, including: the elimination of certain intermediate subsidiaries of DRI that are parents of DNC; the merger of certain intermediate subsidiaries of DRI, affecting the chain of ownership of DNC; and the insertion of a new direct parent for DNC in the corporate structure.

According to an application for approval filed by DNC dated October 8, 2003, the proposed corporate restructuring would involve an internal realignment and consolidation of energy marketing functions within the Dominion companies. The changes would not result in any direct transfer of the facility licenses for the Millstone units which are and would remain held by DNC and, in the case of Millstone Unit No. 3, certain unaffiliated co-owners. Following the proposed restructuring, DNC would continue to operate and (in conjunction with the unaffiliated owners of Millstone Unit No. 3) own the Millstone units. No physical changes to the Millstone units or operational changes are being proposed in the application.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve an application for the indirect transfer of a license, if the Commission determines that the underlying transaction that will effectuate the indirect transfer will not affect the qualifications of the holder of the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

By December 2, 2003, any person whose interest may be affected by the Commission's action on the application may request a hearing and, if not the applicant, may petition for leave to intervene in a hearing proceeding on the Commission's action. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice

set forth in Subpart M, "Public Notification, Availability of Documents and Records, Hearing Requests and Procedures for Hearings on License Transfer Applications," of 10 CFR part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.1306, and should address the considerations contained in 10 CFR 2.1308(a). Untimely requests and petitions may be denied, as provided in 10 CFR 2.1308(b), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.1308(b)(1)-(2).

Requests for a hearing and petitions for leave to intervene should be served upon Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., Rope Ferry Road, Waterford, CT 06385 (telephone: 860-444-5316; fax: 860-444-4278; e-mail:

lillian_cuoco@dom.com; the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001 (e-mail address for filings regarding license transfer cases only: *ogelt@nrc.gov*; and the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff, in accordance with 10 CFR 2.1313.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

As an alternative to requests for hearing and petitions to intervene, by December 12, 2003, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice.

For further details with respect to this action, see the application dated October 8, 2003, available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1

F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1-800-397-4209, 301-415-4737 or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland this 5th day of November, 2003.

For The Nuclear Regulatory Commission.

Richard B. Ennis,

Senior Project Manager, Section 2, Project Directorate I, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 03-28295 Filed 11-10-03; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-498 and 50-499]

STP Nuclear Operating Company, et al.; Notice of Issuance of Amendments to Facility Operating Licenses

The U.S. Nuclear Regulatory Commission (Commission) has issued Amendment No. 157 to Facility Operating License (FOL) No. NPF-76 and Amendment No. 145 to FOL No. NPF-80 for the South Texas Project, Units 1 and 2, respectively, issued to STP Nuclear Operating Company, *et al.* (the licensee). South Texas Project, Units 1 and 2 is located in Matagorda County, Texas. The amendments consist of changes to the FOLs and Appendix C to the FOLs. The amendments delete antitrust conditions contained in the FOLs, and Appendix C, for South Texas Project, Units 1 and 2. The amendments are effective as of the date of issuance.

The application for the amendments complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendments. Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing in connection with this action was published in the **Federal Register** on October 1, 2002 (67 FR 61685) and

September 12, 2003 (68 FR 53758). No request for a hearing or petition for leave to intervene was filed following these notices.

The Commission has prepared an Environmental Assessment related to the action and has determined not to prepare an environmental impact statement. Based upon the environmental assessment, the Commission has concluded that the issuance of the amendments will not have a significant effect on the quality of the human environment (68 FR 53760 dated September 12, 2003).

Further details with respect to the action see (1) the application for amendments dated August 20, 2002, (2) Amendment No. 157 to License No. NPF-76 and Amendment No. 145 to License No. NPF-80, (3) the Commission's related Safety Evaluation, and (4) the Commission's Environmental Assessment. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room, located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, <http://www.nrc.gov/NRC/ADAMS/index.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC Public Document Room Reference staff by telephone at 1-800-397-4209, 301-415-4737, or by email to pdr@nrc.gov.

Dated at Rockville, Maryland, this 31st day of October 2003.

For the Nuclear Regulatory Commission.

David H. Jaffe,

Senior Project Manager, Section 1, Project Directorate IV, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 03-28294 Filed 11-10-03; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Notice

DATES: Weeks of November 10, 17, 24, December 1, 8, 15, 2003.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and closed.

MATTERS TO BE CONSIDERED:

Week of November 10, 2003

Wednesday, November 12, 2003

2 p.m.

Discussion of Intergovernmental Issues (Closed—Ex. 9)

Thursday, November 13, 2003

10:15 a.m.

Affirmation Session (Public Meeting)

Week of November 17, 2003—Tentative

Thursday, November 20, 2003

12:45 p.m.

Briefing on Threat Environment Assessment (Closed—Ex. 1)

Week of November 24, 2003—Tentative

There are no meetings scheduled for the Week of November 24, 2003.

Week of December 1, 2003—Tentative

There are no meetings scheduled for the Week of December 1, 2003.

Week of December 8, 2003

Tuesday, December 9, 2003

1:30 p.m.

Briefing on Equal Employment Opportunity Program (Public Meeting) (Contact: Corentis Kelley, 301-415-7370)

Wednesday, December 10, 2003

9:30 a.m.

Briefing on Strategic Workforce Planning and Human Capital Initiatives (Closed—Ex. 2)

Week of December 15, 2003—Tentative

There are no meetings scheduled for the Week of December 15, 2003.

The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415-1292. Contact person for more information: David Louis Gamberoni (301) 415-1651.

The NRC Commission Meeting Schedule can be found on the Internet at: <http://www.nrc.gov/what-we-do/policy-making/schedule.html>.

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301-415-1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to dkw@nrc.gov.

Dated: November 6, 2003.

D.L. Gamberoni,

Technical Coordinator, Office of the Secretary.

[FR Doc. 03-28410 Filed 11-7-03; 11:10 am]

BILLING CODE 7590-01-M

NUCLEAR REGULATORY COMMISSION

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to Public Law 97-415, the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. Public Law 97-415 revised section 189 of the Atomic Energy Act of 1954, as amended (the Act), to require the Commission to publish notice of any amendments issued, or proposed to be issued, under a new provision of section 189 of the Act. This provision grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued, from October 17, 2003, through October 30, 2003. The last biweekly notice was published on October 28, 2003 (68 FR 59212).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed

determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received before action is taken. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

By December 12, 2003, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, <http://www.nrc.gov/reading-rm/doc-collections/cfr/>. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish

those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff, or may be delivered to the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland, by the above date. Because of continuing disruptions in delivery of mail to United States Government offices, it is requested that petitions for leave to intervene and requests for hearing be transmitted to the Secretary of the Commission either by means of facsimile transmission to 301-415-1101 or by e-mail to hearingdocket@nrc.gov. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, and because of continuing disruptions in delivery of mail to United States Government offices, it is requested that copies be transmitted

either by means of facsimile transmission to 301-415-3725 or by e-mail to OGCMailCenter@nrc.gov. A copy of the request for hearing and petition for leave to intervene should also be sent to the attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for a hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, <http://www.nrc.gov/reading-rm/adams.html>. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR Reference staff at 1-800-397-4209, 301-415-4737 or by e-mail to pdr@nrc.gov.

**Exelon Generation Company, LLC,
Docket Nos. 50-373 and 50-374,
LaSalle County Station, Units 1 and 2,
LaSalle County, Illinois**

Date of amendment request: July 1, 2003.

Description of amendment request: The proposed amendments would revise Appendix A, Technical Specifications (TS), of Facility Operating License Nos. NPF-11 and NPF-18. Specifically, the proposed changes will delete one and add two references to the list of analytical methods in TS 5.6.5, "Core Operating Limits Report (COLR)," that can be used to determine core operating limits. The deleted reference is to an analytical method that is no longer applicable to LaSalle County Station (LSCS). The new references will allow LSCS to use General Electric Company (GE) methods for the determination of fuel assembly critical power of Framatome Advanced Nuclear Fuel, Inc. (Framatome) Atrium-9B and Atrium-10 fuel. The proposed changes are the result of a LSCS decision to insert GE14 fuel during the upcoming refueling outage at LSCS Unit 1 in January 2004. GE's safety analysis methodologies have been previously

used at LSCS and GE14 fuel is currently in use at other Exelon Generation Company, LLC (Exelon), stations.

The first added reference, "GEXL96 Correlation for Atrium-9B Fuel," will list a method that was previously approved by the NRC for use by licensees. The second added reference, "GEXL97 Correlation for Atrium-10 Fuel," will list a GE method for determining the critical power for Atrium-10 fuel. This correlation has not been previously reviewed and approved by the NRC for use by licensees. Additionally, editorial changes will be made to existing references.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes will delete one and add two additional references to the list of administratively controlled analytical methods in TS 5.6.5, "Core Operating Limits Report (COLR)," that can be used to determine core operating limits and make minor editorial changes to the existing references. TS 5.6.5 lists NRC approved analytical methods used at LaSalle County Station (LSCS) to determine core operating limits. [LSCS Unit 1 is scheduled to load GE fuel during its upcoming outage in January 2004.]

The proposed changes to TS Section 5.6.5 will add the fuel analytical methods that support the initial insertion of GE14 fuel to the list of methods used to determine the core operating limits. The deletion or addition of approved methods to TS Section 5.6.5 and minor editorial changes to the existing references has no effect on any accident initiator or precursor previously evaluated and does not change the manner in which the core is operated. The methods have been reviewed to ensure that the output accurately models predicted core behavior, have no effect on the type or amount of radiation released, and have no effect on predicted offsite doses in the event of an accident. Thus, the proposed changes do not have any effect on the probability of an accident previously evaluated.

The proposed changes in the administratively controlled analytical methods does [do] not affect the ability of LSCS to successfully respond to previously evaluated accidents and does [do] not affect radiological assumptions used in the evaluations. Thus, the radiological consequences of any accident previously evaluated are not increased.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed changes do not create the possibility of a new or different kind of

accident from any accident previously evaluated.

The proposed changes to TS Section 5.6.5 do not affect the performance of any LSCS structure, system, or component credited with mitigating any accident previously evaluated. The insertion of a new generation of fuel which has been analyzed with NRC approved methodologies will not affect the control parameters governing unit operation or the response of plant equipment to transient conditions. The proposed changes do not introduce any new modes of system operation or failure mechanisms.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed changes do not involve a significant reduction in a margin of safety.

The proposed changes will delete one and add two additional references to the list of administratively controlled analytical methods in TS 5.6.5 that can be used to determine core operating limits and make minor editorial changes to the titles of existing references. The proposed changes do not modify the safety limits or setpoints at which protective actions are initiated, and do not change the requirements governing operation or availability of safety equipment assumed to operate to preserve the margin of safety. Therefore, LSCS has determined that the proposed changes provide an equivalent level of protection as that currently provided.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the requested amendments involve no significant hazards consideration.

Attorney for licensee: Mr. Edward J. Cullen, Deputy General Counsel, Exelon BSC—Legal, 2301 Market Street, Philadelphia, PA 19101.

NRC Section Chief: Anthony J. Mendiola.

**Maine Yankee Atomic Power Company,
Docket No. 50-309, Maine Yankee
Atomic Power Station, Lincoln County,
Maine**

Date of amendment request: September 11, 2003.

Description of amendment request: Revise the dose model for the containment activated concrete, rebar (hereafter referred to as activated concrete) and liner, by incorporating more realistic radionuclide release rates and to change the associated derived concentration guideline limit (DCGL) for activated concrete.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the

issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The requested license amendment does not authorize any plant activities beyond those allowed by 10 CFR Chapter I or beyond those considered in the DSAR. The bounding accident described in the Defueled Safety Analysis Report (DSAR) for potential airborne activity is the postulated resin cask drop accident in the Low Level Radioactive Waste Storage Building. This accident is expected to contain more potential airborne activity than can be released from other decommissioning events. The radionuclide distribution assumed for the spent resin cask has a greater inventory of transuranic radionuclides (the major dose contributor) than the distribution of plant derived radionuclides in the components involved in other decommissioning accidents. The other accidents considered in the DSAR include: (1) Explosion of liquid petroleum gas (LPG) leaked from a front end loader or forklift; (2) Explosion of oxyacetylene during segmenting of the reactor vessel shell; (3) Release of radioactivity from the RCS decontamination ion exchange resins; (4) Gross leak during in-situ decontamination; (5) Segmentation of RCS piping with unremoved contamination; (6) Fire involving contaminated clothing or combustible waste; (7) Loss of local airborne contamination control during blasting or jackhammer operations; (8) Temporary Loss of Services; (9) Dropping of Contaminated Concrete Rubble; (10) Natural phenomena; and (11) Transportation accidents. The probabilities and consequences for these accidents are estimated in the basis documentation for DSAR Section 7. No systems, structures, or components that could initiate or be required to mitigate the consequences of an accident are affected by the proposed change in any way not previously evaluated in the DSAR. Since Maine Yankee does not exceed the salient parameters associated with the plant referenced in the basis documentation in any material respects, it is concluded that these probabilities and consequences are not increased. Therefore, the proposed change to the Maine Yankee license does not involve any increase in the probability or consequences of any accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The requested license amendment does not authorize any plant activities that could precipitate or result in any accidents beyond those considered in the DSAR. The accidents previously evaluated in the DSAR are described above. These accidents are described in the basis documentation for DSAR Section 7. The proposed change does not affect plant systems, structures, or components in any way not previously

evaluated in the DSAR. Since Maine Yankee does not exceed the salient parameters associated with the plant referenced in the basis documentation in any material respects, it is concluded that these accidents appropriately bound the kinds of accidents possible during decommissioning. Therefore, the proposed change to the Maine Yankee license would not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The margin of safety defined in Maine Yankee's license basis for the consequences of decommissioning accidents has been established as the margin between the bounding decommissioning accident and the dose limits associated with the need for emergency plan offsite protection, namely the Environmental Protection Agency Protective Action Guidelines EPA-PAGs. As described above, the bounding decommissioning accident is the postulated resin cask drop accident in the Low Level Radioactive Waste Storage Building. Since the bounding decommissioning accident is expected to contain more potential airborne activity than can be released from other decommissioning events and since the radionuclide distribution assumed for the spent resin cask has more transuranics (the major dose contributor) than the distribution in the components involved in other decommissioning accidents, the margin of safety associated with the consequences of decommissioning accidents cannot be reduced. The margin of safety defined in the statements of consideration for the final rule on the Radiological Criteria for License Termination is described as the margin between the 100 mrem/yr public dose limit established in 10 CFR 20.1301 for licensed operation and the 25 mrem/yr dose limit to the average member of the critical group at a site considered acceptable for unrestricted use. This margin of safety accounts for the potential effect of multiple sources of radiation exposure to the critical group. Since the license termination plan (LTP) was designed to comply with the radiological criteria for license termination for unrestricted use, the margin of safety cannot be reduced. Therefore, the proposed changes to the Maine Yankee license would not involve a significant reduction in any margin of safety.

Conclusion

Based on the above, Maine Yankee concludes that the proposed amendment presents no significant hazards consideration under the standards set forth in 10 CFR 50.92(c), and, accordingly, a finding of "no significant hazards consideration" is justified.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the requested amendment involves no significant hazards consideration.

Attorney for licensee: Joe Fay, Esquire, Maine Yankee Atomic Power Company, 321 Old Ferry Road, Wiscasset, Maine 04578.

NRC Section Chief: Claudia M. Craig.

**Nuclear Management Company, LLC,
Docket No. 50-255, Palisades Plant,
Van Buren County, Michigan**

Date of amendment request: April 11, 2003.

Description of amendment request: The proposed amendment would make various administrative, editorial, and typographical changes to Technical Specification (TS) Section 5.0, "Administrative Controls." Specifically, the proposed changes would:

(1) Correct TS 5.4.1.a by adding "Appendix A" after the reference to "Regulatory Guide 1.33, Revision 2," and deleting "of" before this reference.

(2) Change TS 5.5.2.e by deleting the phrase "(approximately 44 psig)" which is an invalid reference to the normal hydrostatic head from the safety injection refueling water tank for the test conditions required for maximum allowable leakage from recirculation heat removal systems' components.

(3) Make several editorial changes to TS 5.6.1 to be consistent with the wording of NUREG-1432, "Standard Technical Specifications-Combustion Engineering Plants," Revision 2 (STS), and the changes to the STS in Technical Specification Task Force (TSTF) Traveler TSTF-152. The editorial changes include (a) adding the word "collective" to describe the associated collective deep dose equivalent, (b) adding "thermoluminescence dosimeter" to define its acronym "(TLD)," (c) changing "stations" to "station," (d) adding the words "received from" when describing the 80 percent of total deep dose equivalent received from external sources, and (e) making punctuation changes.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

The following evaluation supports the finding that operation of the facility in accordance with the proposed change would not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed license amendment provides changes to Technical Specification (TS) Administrative Controls sections 5.4.1.a, 5.5.2.e, and 5.6.1. The proposed corrections to TS 5.4.1.a are editorial in nature. The proposed correction to TS 5.5.2.e, which

deletes an erroneous approximate value from the description of test conditions for maximum allowable leakage from recirculation heat removal system components, is consistent with the existing plant design as described in the Palisades Final Safety Analysis Report. The proposed correction to TS 5.6.1 is editorial in nature and is consistent with the Nuclear Regulatory Commission approved standard technical specifications. The proposed amendment does not involve operation of the required structures, systems or components (SSCs) in a manner or configuration different from those previously recognized or evaluated.

Therefore, operation of the facility in accordance with the proposed amendment would not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed amendment does not involve a physical alteration of any SSC or a change in the way any SSC is operated. The proposed amendment does not involve operation of any required SSCs in a manner or configuration different from those previously recognized or evaluated. No new failure mechanisms will be introduced by the changes being requested.

Thus, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Involve a significant reduction in a margin of safety.

The proposed amendment does not affect any margin of safety. The proposed amendment does not involve any physical changes to the plant or manner in which the plant is operated.

Therefore, the proposed amendment would not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Jonathan Rogoff, Esquire, Vice President, Counsel & Secretary, Nuclear Management Company, LLC, 700 First Street, Hudson, WI 54016.

NRC Section Chief: L. Raghavan.

Southern Nuclear Operating Company, Inc., Docket Nos. 50-348, Joseph M. Farley Nuclear Plant, Unit 1, Houston County, Alabama

Date of amendment request: September 19, 2003.

Description of amendment request: The proposed amendment would revise Technical Specifications (TS) Limiting Conditions for Operation (LCO) 3.8.4, "DC Sources—Operating," for the remainder of operating cycle 19.

Specifically, the proposed TS change would increase the Completion Time for the 1B Auxiliary Building DC electrical power system inoperability due to an inoperable battery to allow for on-line replacement of individual cells. Cycle 19 is presently scheduled to end on October 2, 2004.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change to LCO 3.8.4 creates an extended Completion Time for an inoperable 1B Auxiliary Building DC electrical power subsystem due to an inoperable battery on Unit 1 only for the remainder of operating cycle 19. The Auxiliary Building battery is not a direct initiator of any analyzed accident sequence. The radiological consequences of any associated accidents are not impacted by the proposed amendment. Therefore, the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change involves no change to the physical plant. It allows additional time for corrective maintenance on the 1B Auxiliary Building battery on Unit 1. The proposed amendment involves an extension of a previously determined acceptable mode of operation. The proposed amendment does not introduce any new equipment, create new failure modes for existing equipment, or create any new limiting single failures. Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed changes do not involve a significant reduction in a margin of safety.

The physical plant is unaffected by these changes. The proposed changes do not impact accident offsite dose, containment pressure or temperature, emergency core cooling system (ECCS) or reactor protection system (RPS) settings or any other parameter that could affect a margin of safety. Under the proposed amendment, the unit will continue to be operated in a condition that will ensure that emergency power will be available as needed. The extended Completion Time for an inoperable battery has been shown to have a very small impact on plant risk using the criteria of Regulatory Guides 1.174, An Approach for Using Probabilistic Risk Assessments in Risk-Informed Decision-making and 1.177, An Approach for Plant-Specific Risk-Informed Decisionmaking: Technical Specifications and is acceptable. Therefore, the proposed amendment does not

involve a significant reduction in a margin to safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: M. Stanford Blanton, Esq., Balch and Bingham, Post Office Box 306, 1710 Sixth Avenue North, Birmingham, Alabama 35201.

NRC Section Chief: John A. Nakoski.

Southern Nuclear Operating Company, Inc., Docket Nos. 50-348 and 50-364, Joseph M. Farley Nuclear Plant, Units 1 and 2, Houston County, Alabama

Date of amendment request: August 29, 2003.

Description of amendment request: The proposed amendments would revise Technical Specifications Limiting Condition of Operation 3.9.3, "Containment Penetrations." The proposed changes would allow the equipment hatch to be open during core alterations and/or during movement of irradiated fuel assemblies within containment.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

No. The proposed changes will allow the equipment hatch to be open during core alterations and movement of irradiated fuel assemblies inside containment. The proposed changes will not alter the manner in which fuel is handled or core alterations are performed. The equipment hatch is not an initiator of any accident. The status of the equipment hatch during refueling operations has no effect on the probability of the occurrence of any accident previously evaluated. The radiological consequences of a fuel handling accident inside containment have been determined to be well within the limits of 10 CFR 100 and they meet the acceptance criteria of General Design Criterion (GDC) 19. Therefore the proposed changes do not involve a significant increase in the probability or consequences of [any] accident previously evaluated.

2. Do the proposed changes create the possibility of a new or different kind of accident from any previously evaluated?

No. The proposed changes do not create any new failure modes for any system or component, nor do they adversely affect plant operation. No new equipment will be added and no new limiting single failures

will be created. Therefore, the proposed changes do not create the possibility of a new or different kind of accident [from any accident] previously evaluated.

3. Do the proposed changes involve a significant reduction in a margin of safety?

No. The dose consequences were determined to be well within the limits of 10 CFR 100 and they meet the acceptance criteria of GDC 19. Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: M. Stanford Blanton, Esq., Balch and Bingham, Post Office Box 306, 1710 Sixth Avenue North, Birmingham, Alabama 35201.

NRC Section Chief: John A. Nakoski.

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket Nos. 50-321 and 50-366, Edwin I. Hatch Nuclear Plant, Units 1 and 2, Appling County, Georgia

Date of amendment request: October 3, 2003.

Description of amendment request: The proposed amendments would add a Limiting Condition for Operation (LCO) for the Linear Heat Generation Rate. The new LCO will be included in Section 3.2, Power Distribution Limits. The proposed amendments would also change the recirculation loop LCO, Section 5.6.5, and the appropriate Bases.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed addition of LCO 3.2.3 and supporting Bases are being made to support new modeling improvements in core monitoring. This change is administrative in nature in that it does not involve, require, or result from any physical change to the plant, including the reactor core or its fuel. The addition of LCO 3.2.3 and Bases B 3.2.3 is consistent with Revision 2 of Volumes 1 and 2 of NUREG-1433. Changes being proposed for Bases section B 3.2.1 and TS Section 5.6.5 are simply supportive in nature to the relocation of LHGR [linear heat generation rate] from the APLHGR [averageplant linear heat generation rate] Section Bases B 3.2.1 to the new section LHGR B 3.2.3.

Also, no changes are being proposed to any plant system, structure, or component designed to prevent or mitigate the consequences of a previously evaluated event.

Therefore, because the physical characteristics and performance requirements of the plant systems, structures, and components (including the reactor core and fuel) will not be altered, the proposed license amendment does not involve a significant increase in the probability or consequences of any accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

No plant systems, structures, or components (including the reactor core and fuel) will be altered by the proposed change to the LCO or supporting Bases.

Additionally, this TS [technical specification] change request does not propose changes in the operation of any plant system. Consequently, new and unanalyzed modes of operation are not introduced.

As a result, the possibility of a new or different kind of accident from any previously evaluated is not introduced.

3. The proposed change does not involve a significant reduction in the margin of safety.

Previously, the LHGR was included in the monitoring of the APLHGR. Now, SNC [Southern Nuclear Company] proposes to monitor LHGR on its own while continuing to monitor APLHGR. This proposed TS change adds an LCO for LHGR and a corresponding requirement for the COLR [core operating limits report].

The margin of safety is not reduced since the LHGR and APLHGR will continue to be monitored.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ernest L. Blake, Jr., Esquire, Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Section Chief: John A. Nakoski.

STP Nuclear Operating Company, Docket Nos. 50-498 and 50-499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: May 13, 2003.

Description of amendment request: The proposed license amendment would allow use of a revised methodology, for performance of certain accident analyses, described in Westinghouse Electric Corp. (W) report WCAP-14882-S1-P, Revision 0 (Proprietary), "RETRAN-02, Modeling and Qualification for Westinghouse Pressurized Water Reactors Non-LOCA

Safety Analyses, Supplement 1—Thick Metal Mass Heat Transfer Model and NOTRUMP-Based Steam Generator Mass Calculation Method," dated December 2002.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No. The proposed methodology uses more realistic computer models with unnecessary conservatism removed. The methodology used to analyze the consequences of a postulated accident is not an initiator that can affect the probability or consequences of that accident. The change does not alter assumptions previously made in the radiological consequences of the accident. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No. The proposed methodology uses more realistic computer models with unnecessary conservatism removed. The methodology used to analyze the consequences of a postulated accident is not an initiator that can cause an accident to occur. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No. The proposed methodology uses more realistic computer models with unnecessary conservatism removed. Using the methodology of WCAP-14882-S1-P results in additional margin to pressurizer overfill for a postulated loss of normal feedwater/ loss of offsite power at STP. Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

Attorney for licensee: A. H. Gutterman, Esq., Morgan, Lewis & Bockius, 1111 Pennsylvania Avenue, NW., Washington, DC 20004.

NRC Section Chief: Robert A. Gramm.

STP Nuclear Operating Company (STPNOC), Docket Nos. 50-498 and 50-499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: September 22, 2003.

Description of amendment request: The proposed amendments would change the requirements for the Engineered Safety Feature sequencer, and the Surveillance Requirements that are applicable in Mode 5 and 6 to provide needed clarification. In addition, the proposed amendment would correct a typographical error in that requirement "c." in Technical Specification 3.2.4 should actually be requirement "b.".

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes do not change the plant design basis, system configuration or operation, and do not add or affect any accident initiator.

Therefore, STPNOC concludes that there is no significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes do not change the plant design basis, system configuration or operation, and do not add or affect any accident initiator.

Therefore, STPNOC concludes the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

No actual plant equipment or accident analyses will be affected by the proposed change. Additionally, the proposed changes will not relax any criteria used to establish safety limits, will not relax any safety systems settings, or will not relax the bases for any limiting conditions of operation. Therefore, STPNOC concludes the proposed changes do not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the standards of 10 CFR 50.92(c) are satisfied. With regard to the licensee's proposed correction of a typographical error in TS 3.2.4, the NRC staff notes the following:

1. Does the proposed change involve a significant increase in the probability or

consequences of an accident previously evaluated?

Response: No.

Correction of a typographical error does not change the plant design basis, system configuration or operation, and does not add or affect any accident initiator. Therefore, there is no significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

Correction of a typographical error does not change the plant design basis, system configuration or operation, and does not add or affect any accident initiator. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

No actual plant equipment or accident analyses will be affected by the proposed change. Additionally, the proposed changes will not relax any criteria used to establish safety limits, will not relax any safety systems settings, or will not relax the bases for any limiting conditions of operation. Therefore, the proposed change does not involve a significant reduction in the margin of safety.

Based upon the above, the NRC staff concludes that the standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

Attorney for licensee: A. H.

Gutterman, Esq., Morgan, Lewis & Bockius, 1111 Pennsylvania Avenue, NW., Washington, DC 20004.

NRC Section Chief: Robert A. Gramm.

STP Nuclear Operating Company (STPNOC), Docket Nos. 50-498 and 50-499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: September 22, 2003.

Description of amendment request: The proposed amendments would change the Technical Specification 3.3.2 requirements for Loss of Power Instrumentation (Functional Unit 8).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes do not change the plant design basis, system configuration or

operation, and do not add or affect any accident initiator.

Therefore, STPNOC concludes that there is no significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes do not change the plant design basis, system configuration or operation, and do not add or affect any accident initiator.

Therefore, STPNOC concludes the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

No actual plant equipment or accident analyses will be affected by the proposed change. Additionally, the proposed changes will not relax any criteria used to establish safety limits, will not relax any safety systems settings, or will not relax the bases for any limiting conditions of operation. Therefore, STPNOC concludes the proposed changes do not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

Attorney for licensee: A. H.

Gutterman, Esq., Morgan, Lewis & Bockius, 1111 Pennsylvania Avenue, NW., Washington, DC 20004.

NRC Section Chief: Robert A. Gramm.

STP Nuclear Operating Company, Docket Nos. 50-498 and 50-499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: October 16, 2003.

Description of amendment request: The proposed amendments request a one-time change to Technical Specification (TS) 4.4.5.3a to extend the 40-month steam generator inspection interval to 44 months for Unit 1 only.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change does not alter the plant design. The scope of inspections

performed during 1RE10 [Refueling Outage 10 for Unit 1], the first refueling outage following SG [steam generator] replacement, exceeded the TS requirements for the first two refueling outages after replacement combined. That is, more tubes were inspected than were required by TS. Currently, South Texas Project Unit 1 does not have an active SG damage mechanism and will meet the current industry examination guidelines without performing inspections during the next refueling outage. The results of the Condition Monitoring Assessment after 1RE10 demonstrated that all performance criteria were met during 1RE10. The results of the 1RE10 Operational Assessment show that all performance criteria will be met over the proposed operating period.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not alter any plant design basis or postulated accident resulting from potential SG tube degradation. The scope of inspections performed during 1RE10, the first refueling outage following SG replacement, significantly exceeded the TS requirements for the scope of the first two refueling outages after SG replacement combined.

The proposed change does not affect the design of the SGs, the method of operation, or reactor coolant chemistry controls. No new equipment is being introduced and installed equipment is not being operated in a new or different manner. The proposed change involves a one-time extension to the SG tube inservice inspection interval, and therefore will not give rise to new failure modes. In addition, the proposed change does not impact any other plant system or components.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

Steam generator tube integrity is a function of design, environment, and current physical condition. Extending the SG tube inservice inspection frequency [interval] by four months does not alter the function or design of the SGs. Inspections conducted prior to placing the SGs into service (preservice inspections) and inspection during the first refueling outage following SG replacement demonstrate that the SGs do not have fabrication damage or an active damage mechanism. The scope of those inspections significantly exceeded those required by the TS. These inspection results were comparable to similar inspection results for the same model of RSGs [replacement steam generators] installed at other plants, and subsequent inspections at those plants yielded results that support this extension request. The improved design of the

replacement SGs also provides reasonable assurance that significant tube degradation is not likely to occur over the proposed operating period.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

Attorney for licensee: A. H. Gutterman, Esq., Morgan, Lewis & Bockius, 1111 Pennsylvania Avenue, NW., Washington, DC 20004.

NRC Section Chief: Robert A. Gramm.

TXU Generation Company LP, Docket Nos. 50-445 and 50-446, Comanche Peak Steam Electric Station, Units 1 and 2, Somervell County, Texas

Date of amendment request: September 23, 2003.

Brief description of amendments: The proposed change would revise Technical Specification (TS) 3.6.3 entitled, "Containment Isolation Valves," to extend the frequency of Surveillance Requirement 3.6.3.7 for containment and hydrogen purge valves and containment pressure relief valves with resilient seats.

Basis for proposed no significant hazards consideration determination: As required by Title 10 of the Code of Federal Regulations (10 CFR), Section 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Operability and leakage control effectiveness of the containment purge, hydrogen purge and containment pressure relief system isolation valves have no effect on whether or not an accident occurs. Consequently, increasing the interval between surveillances of isolation valve leakrate does not involve a significant increase in the probability of an accident previously evaluated. The consequences of a non-isolated reactor containment building at the time of a fuel-handling accident or LOCA [loss-of-coolant accident] is release of radionuclides to the environment. Analyses have conservatively assumed that a containment pressure relief system line is open at the time of an accident, and release to the environment continues until the isolation valves are closed. In addition, LOCA analyses assume containment leakage of 0.1% of the containment volume per day for the first 24 hours and 0.05% per day for the duration of the accident. Consequently,

increasing the interval between surveillances of isolation valve leakrate does not involve a significant increase in the consequences of an accident previously evaluated.

2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes do not involve a modification to the physical configuration of the plant (*i.e.*, no new equipment will be installed) or change in the methods governing normal plant operation. The proposed change will not impose any new or different requirements or introduce a new accident initiator, accident precursor, or malfunction mechanism. The functions of the containment purge, hydrogen purge and containment pressure relief systems are not altered by this change. Therefore, this proposed change does not create the possibility of an accident of a different kind than previously evaluated.

3. Do the proposed changes involve a significant reduction in a margin of safety?

Response: No.

This proposed change only increases the interval between surveillance tests of the containment purge, hydrogen purge and containment pressure relief system valves. Analyses have conservatively assumed that the containment purge valves are open at the time of a fuel handling accident, and that the containment pressure relief valve is open at the time of a loss-of-coolant accident. In addition, LOCA analyses assume containment leakage of 0.1% of the containment volume per day for the first 24 hours and 0.05% per day for the duration of the accident. The radiological consequences of both an fuel handling accident and a LOCA are unchanged and remain within the 10 CFR 100 limits. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: George L. Edgar, Esq., Morgan, Lewis and Bockius, 1800 M Street, NW., Washington, DC 20036.

NRC Section Chief: Robert A. Gramm.

Wolf Creek Nuclear Operating Corporation, Docket No. 50-482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: October 17, 2003.

Description of amendment request: The licensee is proposing to revise Technical Specification (TS) Section 5.5.6, "Containment Tendon Surveillance Program," for consistency with the requirements of 10 CFR 50.55a(g)(4) for components classified as Code Class CC. The proposed revision to

TS 5.5.6 is to indicate that the Containment Tendon Surveillance Program, inspection frequencies, and acceptance criteria shall be in accordance with Section XI, Subsection IWL of the ASME Boiler and Pressure Vessel Code and the applicable addenda as required by 10 CFR 50.55a, except where an exemption or relief has been authorized by the NRC. The licensee has also proposed to delete the provisions of Surveillance Requirement (SR) 3.0.2 from this specification. In addition, the licensee is proposing to revise TS 5.5.16, "Containment Leakage Rate Testing Program," to add exceptions to Regulatory Guide 1.163, "Performance-Based Containment Leak-Testing Program."

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change revises the TS administrative controls programs for consistency with the requirements of 10 CFR 50.55a(g)(4) for components classified as Code Class CC. The revised requirements do not affect the function of the containment post-tensioning system components. The post-tensioning systems are passive components whose failure modes could not act as accident initiators or precursors.

The proposed change affects the frequency of visual examinations that will be performed for the concrete surfaces of the containment for the purpose of the Containment Leakage Rate Testing Program. In addition, the proposed change allows those examinations to be performed during power operation[,] as opposed to during a refueling outage. The frequency of visual examinations of the concrete surfaces of the containment and the mode of operation during which those examinations are performed has no relationship to or adverse impact on the probability of any of the initiating events assumed in the accident analyses. The proposed change would allow visual examinations[,] that are performed pursuant to NRC approved ASME Section XI Code requirements (except where relief has been granted by the NRC)[,] to meet the intent of visual examinations [as] required by Regulatory Guide 1.163, without requiring additional visual examinations pursuant to the Regulatory Guide. The intent of early detection of deterioration will continue to be met by the more rigorous requirements of the Code[-]required visual examinations. As such, the safety function of the containment as a fission product barrier is maintained.

The proposed change does not impact any accident initiators or analyzed events or assumed mitigation of accident or transient events. They do not involve the addition or

removal of any equipment, or any design changes to the facility.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change revises the TS administrative controls programs for consistency with the requirements of 10 CFR 50.55a(g)(4) for components classified as Code Class CC. The function of the containment post-tensioning system components are not altered by this change. The change affects the frequency of visual examinations that will be performed for the concrete surfaces containments. In addition, the proposed change allows those examinations to be performed during power operation[,] as opposed to during a refueling outage. The proposed change does not involve a modification to the physical configuration of the plant (i.e., no new equipment will be installed) or change in the methods governing normal plant operation. The proposed change will not impose any new or different requirements or introduce a new accident initiator, accident precursor, or malfunction mechanism. Additionally, there is no change in the types or increases in the amounts of any effluent[s] that may be released off-site and there is no increase in individual or cumulative occupational exposure.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The proposed change revises the TS administrative controls programs for consistency with the requirements of 10 CFR 50.55a(g)(4) for components classified as Code Class CC. The function of the containment post-tensioning system components are not altered by this change. The change affects the frequency of visual examinations that will be performed for the concrete surfaces containments. In addition, the proposed change allows those examinations to be performed during power operation[,] as opposed to during a refueling outage. The safety function of the containment as a fission product barrier will be maintained.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Jay Silberg, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Section Chief: Stephen Dembek.

Previously Published Notices of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the Commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration.

For details, see the individual notice in the **Federal Register** on the day and page cited. This notice does not extend the notice period of the original notice.

Entergy Nuclear Operations, Docket No. 50-247, Indian Point Nuclear Generating Unit No. 2, (IP2) Westchester County, New York

Date of application for amendment: March 27, 2002, as supplemented May 30, 2002, July 10, 2002, October 10, 2002, October 28, 2002, November 26, 2002, December 18, 2002, January 6, 2003, January 27, 2003, February 26, 2003, April 8, 2003, May 19, 2003, June 23, 2003, June 26, 2003, July 15, 2003, August 6, 2003, September 11, 2003, October 8, 2003, and October 14, 2003.

Brief description of amendment: The licensee proposed to convert the current Technical Specifications (TSs) for IP2, to a set of improved TSs based on NUREG-1431, "Standard Technical Specifications for Westinghouse Plants," Revision 2, dated April 2001.

*Date of publication of individual notice in **Federal Register**:* September 26, 2003 (68 FR 55660).

Expiration date of individual notice: October 27, 2003.

Attorney for licensee: Mr. John Fulton, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, NY 10601.

NRC Section Chief: Richard J. Laufer.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the

Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC Web site, <http://www.nrc.gov/reading-rm/adams.html>. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1-800-397-4209, 301-415-4737 or by email to pdr@nrc.gov.

**AmerGen Energy Company, LLC,
Docket No. 50-289, Three Mile Island
Nuclear Station, Unit 1 (TMI-1),
Dauphin County, Pennsylvania**

Date of application for amendment: January 16, 2003, as supplemented June 11, 2003.

Brief description of amendment: The amendment revised the Technical Specifications to incorporate changes associated with Cycle 15 core reload design analysis. The Cycle 15 core reload design implements the Framatome ANP Statistical Core Design methodology. This amendment permits the licensee to determine the minimum

departure from nucleate boiling ratio using an NRC-approved methodology based on statistical analysis of operational and design uncertainties.

Date of issuance: October 20, 2003.

Effective date: As of the date of issuance and shall be implemented within 30 days.

Amendment No.: 247.

Facility Operating License No. DPR-50. Amendment revised the Technical Specifications.

Date of initial notice in Federal

Register: March 18, 2003 (68 FR 12948). The supplement dated June 11, 2003, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 20, 2003.

No significant hazards consideration comments received: No.

**Arizona Public Service Company, et al.,
Docket Nos. STN 50-528, STN 50-529,
and STN 50-530, Palo Verde Nuclear
Generating Station, Units Nos. 1, 2, and
3, Maricopa County, Arizona**

Date of application for amendments: November 7, 2002, as supplemented by letters dated April 25, July 10, July 30, August 13, September 18, and October 1, 2003.

Brief description of amendments: The amendments revise Technical Specification (TS) 3.2.4, "Departure From Nucleate Boiling Ratio (DNBR)," TS 3.3.1, "Reactor Protective System (RPS) Instrumentation—Operating," TS 3.3.3, "Control Element Assembly Calculators (CEACs)," and TS 5.4.1, "Administrative Controls—Procedures." The revisions are to Limiting Conditions for Operations (LCOs), LCO Actions, LCO Surveillance Requirements, and the procedures used to modify the core protection calculator addressable constants.

Date of issuance: October 24, 2003.

Effective date: October 24, 2003, and shall be implemented for Unit 1 no later than prior to entry of Unit 1 into Mode 4 during the restart from the Unit 1 spring 2004 refueling outage; for Unit 2 within 90 days of the date of issuance, but no later than prior to entry of Unit 2 into Mode 4 during the restart from the Unit 2 fall 2003 refueling outage; and for Unit 3 no later than prior to entry of Unit 3 into Mode 4 during the restart from the Unit 3 fall 2004 refueling outage.

Amendment Nos.: Unit 1-150, Unit 2-150, Unit 3-150.

Facility Operating License Nos. NPF-41, NPF-51, and NPF-74: The amendments revise the Technical Specifications.

Date of initial notice in Federal

Register: December 10, 2002 (67 FR 75868) with a later notice on August 18, 2003 (68 FR 49527).

The August 13, September 18 and October 1, 2003, supplemental letters provided clarifying information that was within the scope of the **Federal Register** Notice (68 FR 49257) and did not change the no significant hazards consideration determination.

The Commission's related evaluation of the amendments are contained in a Safety Evaluation dated October 24, 2003.

No significant hazards consideration comments received: No.

**Entergy Operations, Inc., Docket No.
50-382, Waterford Steam Electric
Station, Unit 3, St. Charles Parish,
Louisiana**

Date of amendment request:

December 16, 2002, as supplemented by letter dated September 11, 2003.

Brief description of amendment: The amendment revises the current main steam isolation valve (MSIV) Technical Specification (TS) 3/4 7.1.5 to more closely reflect TS 3.7.2 contained in NUREG-1432, Revision 2. In addition, this change removes the MSIVs from the scope of containment isolation valve TS 3/4 6.3 such that only TS 3/4.7.1.5 will apply to the MSIVs.

Date of issuance: October 21, 2003.

Effective date: As of the date of issuance and shall be implemented 60 days from the date of issuance.

Amendment No.: 190.

Facility Operating License No. NPF-38: The amendment revised the Technical Specifications.

Date of initial notice in Federal

Register: February 4, 2003 (68 FR 5671).

The licensee attached a revised no significant hazards consideration (NSHC) determination with the supplement dated September 11, 2003. This revised NSHC determination contained minor wording changes as compared with the NSHC determination sent with the original application dated December 16, 2002, changes made to reflect the new TS changes, and provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the conclusions of the original NSHC determination.

The Commission's related evaluation of the amendment is contained in a

Safety Evaluation dated October 21, 2003.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50-416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Date of application for amendment: May 12, 2003, as supplemented by letter dated August 7, 2003.

Brief description of amendment: The amendment would revise the Technical Specifications to remove the MODE restrictions for performance of Surveillance Requirements 3.8.4.7 and 3.8.4.8 for the Division 3 direct current electrical power subsystem.

Date of issuance: October 27, 2003.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No.: 159.

Facility Operating License No. NPF-29: The amendment revises the Technical Specifications.

Date of initial notice in Federal Register: June 10, 2003 (68 FR 34665). The August 7, 2003, supplemental letter provided clarifying information that did not change the scope of the original Federal Register notice or the original no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 27, 2003.

No significant hazards consideration comments received: No.

Florida Power and Light Company, Docket Nos. 50-250 and 50-251, Turkey Point Plant, Units 3 and 4, Miami-Dade County, Florida

Date of application for amendments: December 20, 2002, as supplemented August 15, 2003.

Brief description of amendments: The amendments provide editorial and administrative changes to the Technical Specifications. The changes correct typographical, spelling, numbering syntax, page break, and font consistency errors as well as removing blank pages and associated references. There are no substantive changes made in the proposed amendment.

Date of issuance: October 21, 2003.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment Nos.: 224 and 219.

Renewed Facility Operating License Nos. DPR-31 and DPR-41: Amendments revised the Technical Specifications.

Date of initial notice in Federal Register: February 4, 2003 (68 FR 5677). The supplemental letter provided clarifying information that was within the scope of the initial notice and did not change the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in an Environmental Assessment dated October 17, 2003, and a Safety Evaluation dated October 21, 2003.

No significant hazards consideration comments received: No.

GPU Nuclear Inc., Docket No. 50-320, Three Mile Island Nuclear Station, Unit 2, Dauphin County, Pennsylvania

Date of amendment request: July 21, 2003.

Brief description of amendment request: The amendment revises the technical specification (TS) administrative controls to make the Three Mile Island (TMI) Unit 2 radioactive effluent control program consistent with the program for the TMI Unit 1 operating reactor TS. The proposed change adopts the TMI Unit 1 liquid discharge limits since both Units 1 and 2 use the same liquid discharge monitor and have a common discharge pathway. The gaseous discharge limits will also be updated to reflect the current 10 CFR 20 nomenclature along with some minor editorial changes. Additionally, the definition of a member of the public will be made consistent with the definition in 10 CFR 20.

Date of issuance: October 20, 2003.

Effective date: As of the date of issuance and shall be implemented within 30 days.

Amendment No.: 60.

Facility Operating License No. DPR-73: Amendment revises the Technical Specifications.

Date of initial notice in Federal Register: September 18, 2003 (68 FR 54750).

The Commission's related evaluation of the amendment is contained in a safety evaluation dated October 20, 2003.

No significant hazards consideration comments received: No.

Nine Mile Point Nuclear Station, LLC, Docket No. 50-220, Nine Mile Point Nuclear Station, Unit No. 1, Oswego County, New York

Date of application for amendment: November 15, 2002, as supplemented by letters dated January 15, July 31, and September 15, 2003.

Brief description of amendment: The amendment revised the reactor coolant system pressure-temperature limit

curves and tables in Section 3/4.2.2, "Minimum Reactor Vessel Temperature for Pressurization," of the Technical Specifications. The revised curves and tables are effective up to 28 effective full-power years.

Date of issuance: October 27, 2003.

Effective date: October 27, 2003, to be implemented within 60 days.

Amendment No.: 183.

Facility Operating License No. DPR-63: Amendment revised the Technical Specifications.

Date of initial notice in Federal Register: December 10, 2002 (67 FR 75882).

The supplemental letters of January 15, July 31, and September 15, 2003, provided clarifying information that did not change the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 27, 2003.

No significant hazards consideration comments received: No.

Nuclear Management Company, LLC, Docket No. 50-255, Palisades Plant, Van Buren County, Michigan

Date of application for amendment: April 30, 2003.

Brief description of amendment: The amendment revises Technical Specification Section 5.3, "Plant Staff Qualifications," to update requirements that have been outdated based on licensed operator training programs being accredited by the National Academy for Nuclear Training and promulgation of the revised 10 CFR Part 55, "Operators" Licenses."

Date of issuance: October 24, 2003.

Effective date: As of the date of issuance and shall be implemented within 45 days.

Amendment No.: 212.

Facility Operating License No. DPR-20: Amendment revised the Technical Specifications.

Date of initial notice in Federal Register: June 10, 2003 (68 FR 34670).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 24, 2003.

No significant hazards consideration comments received: No.

Nuclear Management Company, LLC, Docket Nos. 50-266 and 50-301, Point Beach Nuclear Plant, Units 1 and 2, Town of Two Creeks, Manitowoc County, Wisconsin

Date of application for amendments: October 17, 2002.

Brief description of amendments: The amendment revises Technical

Specification 3.7.9, "Control Room Emergency Filtration System (CREFS)," by deleting the one-time extension to the allowed outage time (AOT) for CREFS and the exception requirements of Limiting Condition for Operation 3.04 and Surveillance Requirement 3.04 that were allowed during the AOT.

Date of issuance: October 16, 2003.

Effective date: As of the date of issuance and shall be implemented within 45 days.

Amendment Nos.: 210 and 215.

Facility Operating License Nos. DPR-24 and DPR-27: Amendments revised the Technical Specifications.

Date of initial notice in Federal Register: February 18, 2003 (68 FR 7818).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated October 16, 2003.

No significant hazards consideration comments received: No.

Nuclear Management Company, LLC, Docket Nos. 50-266 and 50-301, Point Beach Nuclear Plant, Units 1 and 2, Town of Two Creeks, Manitowoc County, Wisconsin

Date of application for amendments: April 30, 2003.

Brief description of amendments: The amendments revise Technical Specification Section 5.3, "Plant Staff Qualifications," to update requirements that have been outdated based on licensed operator training programs being accredited by the National Academy for Nuclear Training and promulgation of the revised 10 CFR Part 55, "Operators" Licenses."

Date of issuance: October 24, 2003.

Effective date: As of the date of issuance and shall be implemented within 45 days.

Amendment Nos.: 211 and 216.

Facility Operating License Nos. DPR-24 and DPR-27: Amendments revised the Technical Specifications.

Date of initial notice in Federal Register: June 10, 2003 (68 FR 34670).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated October 24, 2003.

No significant hazards consideration comments received: No.

Pacific Gas and Electric Company, Docket No. 50-323, Diablo Canyon Nuclear Power Plant, Unit 2, San Luis Obispo County, California

Date of application for amendment: June 26, 2003, as supplemented by letters dated September 3 and September 30, 2003.

Brief description of amendments: The amendment authorizes revisions to the

Diablo Canyon Power Plant (DCPP) Final Safety Analysis Report (FSAR) Update to incorporate the NRC approval of a revised steam generator (SG) voltage-based repair criteria probability of detection (POD) method for DCPP Unit No. 2. The revised POD, based on the probability of prior cycle detection method, is approved to determine the beginning of cycle voltage distribution for DCPP Unit 2 Cycle 12 operational assessment.

Date of issuance: October 21, 2003.

Effective date: October 21, 2003, and shall be implemented within 30 days of the date of issuance. The implementation of the amendment includes the incorporation into the FSAR Update the changes discussed above, as described in the licensee's application dated June 26, 2003, and supplements dated September 3 and September 30, 2003, and evaluated in the staff's Safety Evaluation attached to the amendment.

Amendment No.: 164.

Facility Operating License No. DPR-82: The amendment authorized revision of the FSAR Update.

Date of initial notice in Federal Register: July 22, 2003 (68 FR 43392).

The supplemental letters dated September 3 and September 30, 2003, provided additional clarifying information, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 21, 2003.

No significant hazards consideration comments received: No.

PSEG Nuclear, LLC, Docket Nos. 50-272 and 50-311, Salem Nuclear Generating Station, Unit Nos. 1 and 2, Salem County, New Jersey

Date of application for amendments: April 11, 2003, as supplemented on August 28 and September 22, 2003.

Brief description of amendments: The amendments modify the Salem Nuclear Generating Station, Unit Nos. 1 and 2, Technical Specifications (TS) Surveillance Requirements (SRs) 4.3.1.1.3 and 4.3.2.1.3, and TS Bases Sections B 3/4.3.1 and B 3/4.3.2 relating to response time testing of the Engineered Safety Features Actuation System and the Reactor Trip System. In addition, the amendment for Salem, Unit No. 1, deletes a footnote associated with SR 4.3.2.1.3, regarding a one-time extension to the SR, that is no longer required.

Date of issuance: October 28, 2003.

Effective date: As of the date of issuance, and shall be implemented within 60 days.

Amendment Nos.: 260 and 241.

Facility Operating License Nos. DPR-70 and DPR-75: The amendments revised the TSs.

Date of initial notice in Federal Register: June 10, 2003 (68 FR 34672).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated October 28, 2003.

No significant hazards consideration comments received: No.

South Carolina Electric & Gas Company, South Carolina Public Service Authority, Docket No. 50-395, Virgil C. Summer Nuclear Station, Unit No. 1, Fairfield County, South Carolina

Date of application for amendment: January 14, 2003, as supplemented by letters dated July 1, 2003, and August 20, 2003.

Brief description of amendment: This amendment revises Technical Specification 4.4.5.3.a, maximum inspection interval from 40 calendar months to 58 calendar months after two consecutive inspections which were classified as C-1.

Date of issuance: October 29, 2003.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment No.: 165.

Facility Operating License No. NPF-12: Amendment revises the Technical Specifications.

Date of initial notice in Federal Register: March 4, 2003 (68 FR 10280).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 29, 2003.

No significant hazards consideration comments received: No.

Southern California Edison Company, et al., Docket Nos. 50-361 and 50-362, San Onofre Nuclear Generating Station, Units 2 and 3, San Diego County, California

Date of application for amendments: March 25, 2003.

Brief description of amendments: The proposed changes would revise Technical Specification 3.5.2, "Emergency Core Cooling Systems (ECCS)—Operating," Surveillance Requirement 3.5.2.5. Specifically, the changes replace the requirement to verify specific surveillance test values for the ECCS pumps with the requirement to verify the developed head for each ECCS pump in accordance with the inservice testing Program.

These changes are requested to implement recommendations of the Standard Technical Specifications for Combustion Engineering Plants, NUREG-1432, Revision 2.

Date of issuance: October 24, 2003.

Effective date: October 24, 2003, to be implemented within 60 days of issuance.

Amendment Nos.: Unit 2-190; Unit 3-181.

Facility Operating License Nos. NPF-10 and NPF-15: The amendments revised the Technical Specifications.

Date of initial notice in Federal Register: April 15, 2003 (68 FR 18285).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated October 24, 2003.

No significant hazards consideration comments received: No.

Tennessee Valley Authority, Docket Nos. 50-327 and 50-328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee

Date of application for amendment: January 14, 2003 (TS 02-08).

Brief description of amendment: The proposed amendments revised applicability requirements for Technical Specification (TS) 3.3.9.4, "Containment Building Penetrations." This modified the applicability requirement associated with movement of "irradiated fuel" by adding a new applicability statement for the containment building equipment door. The requested also modified the current licensing basis to replace the current accident source term used in the design basis fuel handling accident radiological analyses with alternate source term.

Date of issuance: October 28, 2003.

Effective date: As of the date of issuance and shall be implemented within 45 days of issuance.

Amendment Nos.: 288 and 278.

Facility Operating License No. DPR-77: Amendments revised the TSs.

Date of initial notice in Federal Register: February 18, 2003 (68 FR 7822).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 28, 2003.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 3rd day of November 2003.

For the Nuclear Regulatory Commission.

Eric J. Leeds,

Deputy Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 03-28065 Filed 11-10-03; 8:45 am]

BILLING CODE 7590-01-P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: This gives notice of OPM decisions, granting authority to make appointments under Schedules A, B and C in the excepted service as required by 5 CFR 6.6 and 213.103.

FOR FURTHER INFORMATION CONTACT:

Deborah Grade, Director, Washington Services Branch, Center for Talent Services, Division for Human Resources Products and Services, (202) 606-5027.

SUPPLEMENTARY INFORMATION: Appearing in the listing below are the individual authorities established under Schedule C between June 1, 2003, and September 30, 2003. OPM also approved 1 Schedule A appointing authority in August 2003. Future notices will be published on the fourth Tuesday of each month, or as soon as possible thereafter. A consolidated listing of all authorities as of June 30 is published each year.

Schedule A

Department of State

Up to 250 time-limited positions within the Department of State in support of the June 2004 Economic Summit of Industrialized Nations. No new appointments may be made under this authority after June 30, 2004. Approved August 19, 2003.

Schedule B

No Schedule B appointments or revocations for June, July, August or September 2003.

Schedule C

The following Schedule C appointments were approved for June, July, August and September 2003:

Section 213.3303 Executive Office of the President, Council on Environmental Quality

EQGS00019 Associate Director for Communications to the Chairman. Effective July 18, 2003.

EQGS00018 Associate Director for Congressional Affairs to the Chairman. Effective August 12, 2003.

EQGS00020 Communications Analyst to the Associate Director for Communications. Effective August 14, 2003.

Office of Management and Budget

BOGS60010 Counselor to the Controller, Office of Federal Financial Management.

Effective June 25, 2003.

BOGS60023 Special Assistant to the Deputy Director for Management. Effective June 25, 2003.

BOGS60025 Confidential Assistant to the Deputy Director for Management. Effective July 01, 2003.

BOGS60033 Executive Assistant to the Director, Office of Management and Budget. Effective July 22, 2003.

BOGS00150 Policy Analyst (Portfolio Manager) to the Associate Director for E-Government and Information Technology. Effective August 06, 2003.

BOGS60011 Confidential Assistant to the Administrator, Office of Information and Regulatory Affairs. Effective August 07, 2003.

BOGS60009 Legislative Analyst to the Assistant Director for Legislative Affairs. Effective September 05, 2003.

BOGS60031 Confidential Assistant to the Deputy Director, Office of Management and Budget. Effective September 12, 2003.

Office of the United States Trade Representative

TNGS00014 Confidential Assistant to the Chief Agriculture Negotiator. Effective July 30, 2003.

Office of Science and Technology Policy

TSGS60030 Confidential Assistant to the Chief of Staff and General Counsel. Effective June 27, 2003.

TSGS60031 Special Assistant for Public Affairs to the Chief of Staff and General Counsel. Effective June 27, 2003.

Section 213.3304 Department of State

DSGS60444 Foreign Affairs Officer (Visits) to the Chief of Protocol. Effective June 09, 2003.

DSGS60381 Supervisory Protocol Officer (Visits) to the Deputy Chief of Protocol. Effective June 12, 2003.

DSGS60473 Coordinator for Intergovernmental Affairs to the Assistant Secretary for Public Affairs. Effective June 13, 2003.

DSGS60481 Administrative Officer to the Undersecretary for Management. Effective June 13, 2003.

DSGS60542 Public Affairs Specialist to the Assistant Secretary for Public Affairs. Effective June 13, 2003.

DSGS60585 Staff Assistant to the Managing Director, Office of Equal Opportunity and Civil Rights. Effective June 26, 2003.

DSGS60490 Staff Assistant to the Senior Advisor to the Secretary and White House Liaison. Effective June 27, 2003.

DSGS60497 Special Assistant to the Undersecretary for Management. Effective July 11, 2003.

DSGS60552 Public Affairs Specialist to the Assistant Secretary for Public Affairs. Effective July 18, 2003.

DSGS00341 Information Technology Specialist to the Assistant Secretary for Administration. Effective July 31, 2003.

DSGS60438 Special Assistant to the Assistant Secretary for Economic and Business Affairs. Effective August 01, 2003.

DSGS60351 Staff Assistant to the Senior Advisor to the Secretary and White House Liaison. Effective August 06, 2003.

DSGS60550 Legislative Management Officer to the Assistant Secretary for Legislative and Intergovernmental Affairs. Effective August 07, 2003.

DSGS60504 Legislative Management Officer to the Assistant Secretary for Legislative and Intergovernmental Affairs. Effective September 04, 2003.

DSGS60417 Supervisory Foreign Affairs Officer to the Undersecretary for Global Affairs. Effective September 05, 2003.

DSGS60434 Special Assistant to the Senior Advisor to the Secretary and White House Liaison. Effective September 05, 2003.

DSGS60541 Foreign Affairs Officer to the Undersecretary for Global Affairs. Effective September 05, 2003.

DSGS60577 Public Affairs Specialist to the Undersecretary for Global Affairs. Effective September 05, 2003.

DSGS60610 Legislative Analyst to the Assistant Secretary for Legislative and Intergovernmental Affairs. Effective September 09, 2003.

DSGS60609 Program Analyst to the Undersecretary for Public Diplomacy and Public Affairs. Effective September 10, 2003.

DSGS60492 Staff Assistant to the Undersecretary for Arms Control And International Security. Effective September 10, 2003.

DSGS60506 Special Assistant to the Assistant Secretary for Public Affairs. Effective September 25, 2003.

DSGS60495 Foreign Affairs Officer to the Undersecretary for Public Diplomacy and Public Affairs. Effective September 26, 2003.

DSGS60508 Special Assistant to the Undersecretary for Arms Control and Security Affairs. Effective September 26, 2003.

DSGS60521 Staff Assistant to the Senior Advisor to the Secretary and White House Liaison. Effective September 26, 2003.

DSGS60539 Staff Assistant to the Undersecretary for Arms Control and Security Affairs. Effective September 29, 2003.

Section 213.3305 Department of the Treasury

DYGS00430 Senior Advisor to the Undersecretary for Domestic Finance. Effective June 18, 2003.

DYGS00433 Manager of Public and Legislative Affairs to the Director for Community Development and Financial Institutions. Effective June 27, 2003.

DYGS60379 Special Assistant for Advance to the Director of Strategic Planning, Scheduling and Advance. Effective July 15, 2003.

DYGS00435 Director of Protocol to the Deputy Assistant Secretary (Departmental Offices Operations). Effective September 17, 2003.

DYGS60364 Deputy Assistant Secretary to the Assistant Secretary (Financial Institutions). Effective September 17, 2003.

DYGS60396 Senior Advisor to the Deputy Assistant Secretary (Public Liaison) to the Deputy Assistant Secretary (Public Liaison). Effective September 17, 2003.

DYGS00434 Special Assistant to the Deputy Chief of Staff. Effective September 26, 2003.

Section 213.3306 Office of the Secretary of Defense

DDGS00682 Staff Assistant to the Deputy Assistant Secretary of Defense (Asia and Pacific). Effective June 09, 2003.

DDGS16707 Defense Fellow to the Special Assistant to the Secretary of Defense for White House Liaison. Effective June 24, 2003.

DDGS16709 Defense Fellow to the Special Assistant to the Secretary of Defense for White House Liaison. Effective July 01, 2003.

DDGS00708 Personal and Confidential Assistant to the Assistant Secretary of Defense (International Security Affairs). Effective July 07, 2003.

DDGS00690 Director, Defense Continuity Program Office to the Deputy Undersecretary of Defense (Policy Support). Effective July 10, 2003.

DDGS16711 Personal and Confidential Assistant to the Principal Deputy Undersecretary of Defense for Policy. Effective July 10, 2003.

DDGS16678 Special Assistant to the Principal Deputy Assistant Secretary of Defense (Legal Affairs). Effective July 29, 2003.

DDGS00714 Special Assistant to the Undersecretary of Defense (Policy). Effective August 04, 2003.

DDGS16561 Special Assistant to the Director of Defense Research and Engineering. Effective August 04, 2003.

DDGS00736 Special Assistant to the Principal Deputy Undersecretary of Defense. Effective September 03, 2003.

DDGS00716 Staff Assistant to the Deputy Undersecretary of Defense (Special Plans and Near East/South Asian Affairs). Effective September 09, 2003.

DDGS16740 Confidential Assistant to the Secretary of Defense. Effective September 09, 2003.

DDGS00749 Staff Assistant to the Assistant Secretary of Defense (International Security Affairs). Effective September 15, 2003.

DDGS16718 Public Affairs Specialist to the Assistant Secretary of Defense (Public Affairs). Effective September 23, 2003.

Section 213.3307 Department of the Army

DWGS00084 Personal and Confidential Assistant to the Undersecretary of the Army. Effective September 15, 2003.

Section 213.3309 Department of the Air Force

DFGS60008 Confidential Assistant to the General Counsel. Effective September 03, 2003.

Section 213.3310 Department of Justice

DJGS00441 Counsel to the Assistant Attorney General Tax Division. Effective June 06, 2003.

DJGS00219 Principal Deputy Director to the Director of the Bureau of Justice Assistance. Effective June 10, 2003.

DJGS00218 Special Assistant to the Assistant Attorney General for Justice Programs. Effective June 12, 2003.

DJGS60346 Deputy Director and Senior Advisor to the Director, Office of Public Affairs. Effective June 16, 2003.

DJGS00413 Executive Assistant to the United States Attorney. Effective June 18, 2003.

DJGS00035 Counsel (Senior Attorney) to the Administrator, Drug Enforcement Administration. Effective June 20, 2003.

DJGS00235 Senior Advisor to the Director, Office of Public Affairs. Effective June 23, 2003.

DJGS00036 Chief of Staff to the Administrator, Drug Enforcement Administration. Effective July 07, 2003.

DJGS00077 Secretary to the United States Attorney. Effective July 11, 2003.

DJGS00186 Counsel to the Deputy Attorney General. Effective July 18, 2003.

DJGS00028 Director of Congressional Affairs to the Administrator, Drug Enforcement Administration. Effective July 24, 2003.

DJGS00220 Deputy Director for Programs to the Director of the Bureau

of Justice Assistance. Effective July 25, 2003.

DJGS60287 Special Assistant to the Assistant Attorney General Criminal Division. Effective August 11, 2003.

DJGS00283 Confidential Assistant to the Director. Effective August 12, 2003.

DJGS00303 Associate Director to the Director. Effective August 12, 2003.

DJGS60097 Assistant to the Attorney General. Effective August 18, 2003.

DJGS60185 Counsel to the Deputy Attorney General. Effective September 15, 2003.

DJGS00286 Special Assistant to the Assistant Attorney General Criminal Division. Effective September 16, 2003.

DJGS00333 Special Assistant to the Assistant Attorney General. Effective September 23, 2003.

Section 213.3311 Department of Homeland Security

DMGS00073 Staff Assistant to the Executive Secretary. Effective June 04, 2003.

DMGS00081 Executive Assistant to the Executive Director, Homeland Security Advisory Council. Effective June 04, 2003.

DMGS00082 Research Coordination Officer to the Executive Secretary. Effective June 04, 2003.

DMGS00077 Press Secretary to the Assistant Secretary for Public Affairs. Effective June 05, 2003.

DMGS00080 Director of Communications for Immigration and Customs Enforcement to the Assistant Secretary for Public Affairs. Effective June 12, 2003.

DMGS00071 Executive Assistant to the Undersecretary for Emergency Preparedness and Response. Effective June 13, 2003.

DMGS00085 Confidential Assistant to the Assistant Secretary for Information Analysis. Effective June 13, 2003.

DMGS00089 Executive Assistant to the Undersecretary for Emergency Preparedness and Response. Effective June 13, 2003.

DMGS00083 Press Assistant to the Director of Communications. Effective June 19, 2003.

DMGS00088 Research Assistant to the Director of Speechwriting. Effective June 19, 2003.

DMGS00086 Writer-Editor to the Director of Speechwriting. Effective June 20, 2003.

DMGS00084 Staff Assistant to the Assistant Secretary for Plans, Programs and Budgets. Effective June 23, 2003.

DMGS00091 Confidential Assistant to the Director, National Capital Region Coordination. Effective June 30, 2003.

DMGS00092 Staff Assistant to the Assistant Secretary for Border and

Transportation Security Policy. Effective July 02, 2003.

DMGS00090 Press Secretary to the Executive Officer. Effective July 03, 2003.

DMGS00094 Policy Assistant to the Chief of Staff. Effective July 11, 2003.

DMGS00097 Policy Analyst to the Special Assistant. Effective July 17, 2003.

DMGS00095 Policy Director for Immigration to the Assistant Secretary for Border and Transportation Security Policy. Effective July 21, 2003.

DMGS00099 Operations Officer to the Deputy Chief of Staff (Operations). Effective July 29, 2003.

DMGS00101 Director/Executive Secretariat, Private Sector Advisory Committee to the Special Assistant. Effective July 29, 2003.

DMGS00106 Director of Communications for Information Analysis and Infrastructure Protection to the Director of Communications. Effective July 30, 2003.

DMGS00093 Staff Assistant to the Chief of Staff. Effective August 01, 2003.

DMGS00098 Special Assistant to the Undersecretary for Information Analysis and Infrastructure Protection. Effective August 06, 2003.

DMGS00110 Public Affairs Specialist to the Chief of Staff. Effective August 07, 2003.

DMGS00113 Press Assistant to the Press Secretary (Science and Technology). Effective August 07, 2003.

DMGS00011 Executive Assistant to the Chief of Staff. Effective August 11, 2003.

DMGS00105 Executive Assistant to the Director, State and Local Affairs. Effective August 12, 2003.

DMGS00108 Director of Communications to the Chief of Staff. Effective August 12, 2003.

DMGS00115 Policy Analyst to the Special Assistant. Effective August 13, 2003.

DMGS00103 Public Affairs Specialist to the Director of Communications. Effective August 14, 2003.

DMGS00114 Director, Office of Policy to the Chief of Staff. Effective August 14, 2003.

DMGS00117 Special Assistant to the Undersecretary for Management. Effective August 20, 2003.

DMGS00118 Special Assistant for Administration to the Chief of Staff. Effective August 20, 2003.

DMGS00112 Executive Assistant to the Chief of Staff. Effective August 25, 2003.

DMGS00124 Chief Information Officer for Science and Technology to the Undersecretary for Science and Technology. Effective August 28, 2003.

DMGS00104 Staff Assistant to the Officer of Civil Rights and Civil Liberties. Effective August 29, 2003.

DMGS00116 Staff Assistant to the Chief of Staff. Effective September 03, 2003.

DMGS00126 Director of Communications for Bureau of Citizenship and Immigration Services to the Director of Communications. Effective September 03, 2003.

DMGS00109 Business Liaison to the Special Assistant. Effective September 04, 2003.

DMGS00122 Director of Legislative Affairs for Science and Technology to the Assistant Secretary for Legislative Affairs. Effective September 05, 2003.

DMGS00111 Senior Editor and Correspondence Analyst to the Executive Secretary. Effective September 10, 2003.

DMGS00123 Assistant Director of Legislative Affairs for Border and Transportation Security to the Assistant Secretary for Legislative Affairs. Effective September 12, 2003.

DMGS00129 Executive Assistant to the Director, Office of International Affairs. Effective September 12, 2003.

DMGS00131 Legislative Assistant to the Assistant Secretary for Legislative Affairs. Effective September 12, 2003.

DMGS00130 Director of Special Projects to the Director of Communications. Effective September 23, 2003.

DMGS00119 Director, Public Affairs Division to the Undersecretary for Emergency Preparedness and Response. Effective September 24, 2003.

DMGS00134 Writer-Editor (Speechwriter) to the Director of Speechwriting. Effective September 24, 2003.

DMGS00125 Writer-Editor to the Executive Secretary. Effective September 26, 2003.

DMGS00132 Director of Communications for Information Analysis and Infrastructure Protection to the Director of Communications. Effective September 26, 2003.

Section 213.3312 Department of the Interior

DIGS01019 Confidential Assistant to the Senior Advisor to the Secretary for Alaskan Affairs. Effective July 30, 2003.

DIGS01020 Special Assistant to the Deputy Assistant Secretary Indian Affairs. Effective July 31, 2003.

DIGS01022 Senior Advisor to the Assistant Secretary for Fish and Wildlife and Parks. Effective August 29, 2003.

DIGS60068 Associate Director to the Director, Congressional and Legislative Affairs. Effective September 05, 2003.

Section 213.3313 Department of Agriculture

DAGS60231 Director, Legislative and Public Affairs Staff to the Deputy Undersecretary for Rural Development. Effective June 10, 2003.

DAGS00189 Director, Native American Programs to the Assistant Secretary for Administration. Effective June 13, 2003.

DAGS00190 Confidential Assistant to the Administrator, Farm Service Agency. Effective June 27, 2003.

DAGS00191 Special Assistant to the Administrator, Farm Service Agency. Effective June 27, 2003.

DAGS00192 Special Assistant to the Chief Information Officer. Effective July 11, 2003.

DAGS00194 Director, Native American Programs to the Director of Civil Rights. Effective August 14, 2003.

DAGS00196 Confidential Assistant to the Director of Civil Rights. Effective August 27, 2003.

Section 213.3314 Department of Commerce

DCGS00507 Confidential Assistant to the Deputy Assistant Secretary for Export Promotion Services. Effective June 06, 2003.

DCGS00444 Senior Advisor to the Assistant Secretary for Economic Development. Effective June 09, 2003.

DCGS00686 Director of Advance to the Chief of Staff. Effective June 25, 2003.

DCGS00275 Special Assistant to the Director, Office of Business Liaison. Effective June 26, 2003.

DCGS00438 Special Assistant to the Director, Office of Business Liaison. Effective July 01, 2003.

DCGS00693 Senior Policy Advisor to the Undersecretary for Oceans and Atmosphere. Effective July 22, 2003.

DCGS60350 Deputy Director to the Director, Office of Business Liaison. Effective July 22, 2003.

DCGS00065 Confidential Assistant to the Assistant Secretary for Economic Development. Effective July 23, 2003.

DCGS00161 Confidential Assistant to the Undersecretary for International Trade. Effective July 23, 2003.

DCGS00218 Senior Advisor to the Regional Administrator for the Northwest Region. Effective August 06, 2003.

DCGS00359 Confidential Assistant to the Assistant Secretary for Market Access and Compliance. Effective August 07, 2003.

DCGS00468 Special Assistant to the Undersecretary for Export Administration. Effective August 14, 2003.

DCGS00227 Confidential Assistant to the Director, Minority Business Development Agency. Effective September 05, 2003.

DCGS00576 Deputy Director, Office of Advance to the Director of Advance. Effective September 09, 2003.

DCGS00425 Director of Public Affairs to the Undersecretary for International Trade. Effective September 12, 2003.

DCGS00202 Legislative Affairs Specialist to the Assistant Secretary for Congressional and Intergovernmental Affairs. Effective September 22, 2003.

DCGS00447 Confidential Assistant to the Director of Scheduling. Effective September 25, 2003.

Section 213.3315 Department of Labor

DLGS60094 Director of Media Affairs to the Assistant Secretary for Public Affairs. Effective June 06, 2003.

DLGS60044 Attorney Advisor (Labor) to the Solicitor of Labor. Effective June 10, 2003.

DLGS60168 Intergovernmental Officer to the Assistant Secretary for Congressional and Intergovernmental Affairs. Effective June 13, 2003.

DLGS60210 Special Assistant to the Director, Office of Faith-Based and Community Initiatives. Effective June 13, 2003.

DLGS60011 Staff Assistant to the Chief Financial Officer. Effective June 20, 2003.

DLGS60182 Special Assistant to the Deputy Secretary of Labor. Effective June 25, 2003.

DLGS60139 Special Assistant to the Assistant Secretary for Public Affairs. Effective June 30, 2003.

DLGS60153 Special Assistant to the Deputy Undersecretary for International Affairs. Effective July 29, 2003.

DLGS60092 Senior Advisor to the Director, 21st Century Workforce. Effective August 07, 2003.

DLGS60117 Special Assistant to the Assistant Secretary for Employment Standards. Effective August 12, 2003.

DLGS60231 Staff Assistant to the Director, 21st Century Workforce. Effective August 14, 2003.

DLGS60217 Senior Legislative Officer to the Assistant Secretary for Congressional and Intergovernmental Affairs. Effective August 15, 2003.

DLGS60125 Special Assistant to the Chief of Staff. Effective August 25, 2003.

DLGS60267 Speechwriter to the Assistant Secretary for Administration and Management. Effective August 27, 2003.

DLGS60135 Staff Assistant to the Director of Public Liaison. Effective September 11, 2003.

DLGS60009 Regional Representative to the Assistant Secretary for

Congressional and Intergovernmental Affairs. Effective September 12, 2003.

DLGS60109 Regional Representative to the Assistant Secretary for Congressional and Intergovernmental Affairs. Effective September 12, 2003.

DLGS60015 Legislative Officer to the Assistant Secretary for Congressional and Intergovernmental Affairs. Effective September 22, 2003.

DLGS60025 Senior Intergovernmental Officer to the Director, Office of Faith-Based and Community Initiatives. Effective September 22, 2003.

DLGS60189 Special Assistant to the Chief Financial Officer. Effective September 22, 2003.

DLGS60244 Special Assistant to the Director, Office of Faith-Based and Community Initiatives. Effective September 29, 2003.

Section 213.3316 Department of Health and Human Services

DHGS60519 Speechwriter to the Deputy Assistant Secretary for Public Affairs (Policy and Communications). Effective June 16, 2003.

DHGS60525 Confidential Assistant to the Director, Executive Operations. Effective June 16, 2003.

DHGS60119 Special Assistant to the White House Liaison to the Director of Intergovernmental Affairs. Effective July 02, 2003.

DHGS60171 Special Assistant to the Principal Deputy Assistant Secretary for Health to the Deputy Assistant Secretary for Health. Effective July 02, 2003.

DHGS60244 Regional Director, Seattle, Washington, Region 10 to the Deputy Secretary, Department of Health and Human Services. Effective July 11, 2003.

DHGS60031 Deputy Director, President's Council on Physical Fitness and Sports to the Executive Director, President's Council on Physical Fitness and Sports. Effective July 14, 2003.

DHGS60126 Confidential Assistant to the Assistant Secretary for Legislation to the Deputy Assistant Secretary for Legislation (Health). Effective August 12, 2003.

DHGS60539 Special Assistant to the General Counsel. Effective August 13, 2003.

DHGS60344 Special Assistant for the Deputy Assistant Secretary (Health) to the Deputy Assistant Secretary for Legislation (Health). Effective September 05, 2003.

DHGS60345 Director of Public Affairs to the Assistant Secretary Administrator for Children and Families. Effective September 05, 2003.

DHGS60667 Confidential Assistant to the Executive Secretary. Effective September 11, 2003.

DHGS60119 Special Assistant to the White House Liaison to the Director of Intergovernmental Affairs. Effective September 12, 2003.

DHGS60129 Special Assistant to the Administrator Centers for Medicare and Medicaid Services. Effective September 29, 2003.

Section 213.3317 Department of Education

DBGS00269 Special Assistant to the Deputy Assistant Secretary. Effective June 04, 2003.

DBGS00270 Confidential Assistant to the Deputy Chief of Staff for Operations. Effective June 04, 2003.

DBGS00271 Special Assistant to the Chief of Staff. Effective June 06, 2003.

DBGS00272 Special Assistant to the Chief of Staff to the Undersecretary. Effective June 16, 2003.

DBGS00277 Special Assistant to the Special Assistant. Effective June 19, 2003.

DBGS00278 Special Assistant to the Assistant Secretary for Legislation and Congressional Affairs. Effective June 20, 2003.

DBGS00276 Confidential Assistant to the Chief of Staff. Effective June 26, 2003.

DBGS00279 Special Assistant to the Deputy Assistant Secretary for Intergovernmental, Constituent Relations and Corporate Liaison. Effective June 27, 2003.

DBGS00281 Confidential Assistant to the Chief of Staff to the Undersecretary. Effective June 27, 2003.

DBGS00274 Deputy Secretary's Regional Representative to the Deputy Assistant Secretary for Regional Services. Effective June 30, 2003.

DBGS00280 Confidential Assistant to the Chief of Staff to the Deputy Secretary. Effective July 08, 2003.

DBGS00282 Confidential Assistant to the Chief of Staff. Effective July 10, 2003.

DBGS00284 Confidential Assistant (Protocol) to the Deputy Chief of Staff for Operations. Effective July 16, 2003.

DBGS00286 Confidential Assistant to the Assistant Secretary for Elementary and Secondary Education. Effective August 04, 2003.

DBGS00287 Confidential Assistant to the Assistant Secretary for Legislation and Congressional Affairs. Effective August 06, 2003.

DBGS00258 Confidential Assistant to the Assistant Secretary for Management/Chief Information Officer. Effective August 11, 2003.

DBGS00289 Special Assistant to the Deputy Assistant Secretary for Intergovernmental, Constituent Relations and Corporate Liaison. Effective August 11, 2003.

DBGS00288 Confidential Assistant to the Assistant Secretary for Legislation and Congressional Affairs. Effective August 13, 2003.

DBGS00285 Special Assistant (Education Attache to the U.S. Mission to the United Nations Educational, Scientific and Cultural Organization) to the Secretary. Effective August 21, 2003.

DBGS00273 Special Assistant to the Assistant Secretary for Elementary and Secondary Education. Effective July 18, 2003.

DBGS00292 Confidential Assistant to the Deputy Chief of Staff for Operations. Effective September 09, 2003.

DBGS00291 Special Assistant to the Assistant Secretary for Special Education and Rehabilitative Services. Effective September 10, 2003.

DBGS00290 Confidential Assistant to the Deputy Assistant Secretary. Effective September 17, 2003.

DBGS00295 Confidential Assistant to the Deputy Director of Communications, Office of Public Affairs. Effective September 23, 2003.

DBGS00296 Special Assistant to the Director, Faith-Based and Community Initiatives Center. Effective September 25, 2003.

DBGS00293 Confidential Assistant to the Assistant Secretary for Civil Rights. Effective September 26, 2003.

DBGS00294 Special Assistant (Deputy Director, White House Liaison) to the Special Assistant (White House Liaison). Effective September 26, 2003.

Section 213.3318 Environmental Protection Agency

EPGS03604 Supervisory Program Analyst to the Associate Administrator for Congressional and Intergovernmental Relations. Effective June 04, 2003.

EPGS03603 Program Analyst to the Associate Administrator for Congressional and Intergovernmental Relations. Effective June 12, 2003.

EPGS03605 Administrative Assistant to the Assistant Administrator for Enforcement and Compliance Assurance. Effective August 22, 2003.

Section 213.3325 United States Tax Court

JCGS60075 Trial Clerk to the Chief Judge. Effective July 08, 2003.

JCGS60079 Trial Clerk to the Chief Judge. Effective July 25, 2003.

JCGS60057 Secretary (Confidential Assistant) to the Chief Judge. Effective August 06, 2003.

JCGS60058 Secretary (Confidential Assistant) to the Chief Judge. Effective August 11, 2003.

JCGS60055 Secretary (Confidential Assistant) to the Chief Judge. Effective September 17, 2003

Section 213.3327 Department of Veterans Affairs

DVGS60060 Special Assistant to the Assistant Secretary for Congressional and Legislative Affairs. Effective September 22, 2003.

Section 213.3328 Broadcasting Board of Governors

IBGS00013 Chief of Staff to the Director, Office of Cuba Broadcasting. Effective August 19, 2003.

IBGS00014 Confidential Assistant to the Director, Office of Cuba Broadcasting. Effective August 20, 2003.

Section 213.3330 Securities and Exchange Commission

SEOT60011 Staff Assistant to the Managing Executive for External Affairs. Effective August 28, 2003.

Section 213.3331 Department of Energy

DEGS00331 Advance and Trip Coordinator to the Director, Office of Scheduling and Advance. Effective June 04, 2003.

DEGS00332 Senior Advance Representative to the Director, Office of Scheduling and Advance. Effective June 04, 2003.

DEGS00333 Senior Advance Representative to the Director, Office of Scheduling and Advance. Effective June 04, 2003.

DEGS00330 Confidential Assistant to the Assistant Secretary for Environment, Safety and Health. Effective June 09, 2003.

DEGS00267 Special Assistant to the Assistant Secretary for Fossil Energy. Effective June 17, 2003.

DEGS00334 Special Assistant to the Secretary, Department of Energy. Effective June 17, 2003.

DEGS00289 Special Assistant to the Assistant Secretary of Energy (Environmental Management). Effective June 18, 2003.

DEGS00337 Policy Analyst/External Affairs to the Assistant Secretary for International Affairs. Effective June 30, 2003.

DEGS00335 Senior Policy Analyst to the Assistant Secretary for International Affairs. Effective July 10, 2003.

DEGS00342 Trip Coordinator to the Director, Office of Scheduling and Advance. Effective July 21, 2003.

DEGS00344 Deputy Director of Advance for Strategic Initiatives to the Director, Office of Scheduling and Advance. Effective July 29, 2003.

DEGS00347 Special Assistant to the Assistant Secretary of Energy

(Environmental Management). Effective July 31, 2003.

DEGS00340 Policy Advisor to the Deputy Assistant Secretary to the Assistant Secretary for Fossil Energy. Effective August 01, 2003.

DEGS00341 Confidential Assistant to the Deputy Administrator for Defense Programs, National Nuclear Proliferation. Effective August 6, 2003.

DEGS00346 Communications Assistant to the Chief of Staff. Effective August 11, 2003.

DEGS00348 Policy Advisor to the Director, Office of Science. Effective September 05, 2003.

Section 213.3332 Small Business Administration

SBGS60093 Director of Scheduling to the Chief of Staff. Effective July 02, 2003.

SBGS60542 Assistant Administrator for Policy Planning and Programs to the Administrator. Effective July 08, 2003.

SBGS60550 Assistant Administrator to the Associate Administrator for Congressional and Legislative Affairs. Effective August 07, 2003.

SBGS60124 Special Assistant to the Associate Administrator for Congressional and Legislative Affairs. Effective August 14, 2003.

SBGS60540 Assistant Administrator for the Office of Policy and Planning to the Administrator. Effective September 10, 2003.

SBGS60551 Assistant Administrator for Congressional and Legislative Affairs to the Associate Administrator for Congressional and Legislative Affairs. Effective September 12, 2003.

SBGS60179 Press Secretary to the Associate Administrator for Communications/Public Liaison. Effective September 15, 2003.

SBGS60108 Speechwriter to the Associate Administrator for Communications/Public Liaison. Effective September 24, 2003.

Section 213.3337 General Services Administration

SGSG00088 Special Assistant to the Regional Administrator, Northwest Arctic Region to the Regional Administrator, Region 10, Auburn, Washington. Effective June 25, 2003.

SGSG60117 Senior Advisor to the Chief of Staff. Effective July 03, 2003.

Section 213.3339 United States International Trade Commission

TCGS00012 Confidential Assistant to a Commissioner. Effective September 29, 2003.

Section 213.3346 Selective Service System

SSGS00001 Public Affairs Specialist to the Deputy Director. Effective June 13, 2003.

Section 213.3348 National Aeronautics and Space Administration

NNGS30115 White House Liaison to the Administrator. Effective June 27, 2003.

Section 213.3353 Merit Systems Protection Board

MPGS60012 Senior Advisor to a Board Member. Effective June 20, 2003.

Section 213.3355 Social Security Administration

SZGS60007 Special Assistant to a Commissioner. Effective June 09, 2003.

SZGS60008 Special Assistant to the Chief of Staff. Effective June 9, 2003.

SZGS60009 Executive Assistant to the Deputy Commissioner for Communications. Effective June 13, 2003.

SZGS00010 Special Assistant to the Deputy Commissioner for Communications. Effective September 10, 2003.

Section 213.3356 Commission on Civil Rights

CCGS00025 Special Assistant to a Commissioner. Effective June 4, 2003.

CCGS60029 Special Assistant to Commissioner. Effective August 11, 2003.

Section 213.3360 Consumer Product Safety Commission

PSGS00066 Supervisory Public Affairs Specialist to the Executive Director. Effective August 28, 2003.

Section 213.3382 National Endowment for the Arts

NAGS60049 Deputy Congressional Liaison to the Director, Office of Government Affairs. Effective September 12, 2003.

Section 213.3382 National Endowment for the Humanities

NHGS60075 Director of Communications to the Deputy Chairman. Effective June 8, 2003.

Section 213.3384 Department of Housing and Urban Development

DUGS60276 Staff Assistant to the Assistant Secretary for Housing, Federal Housing Commissioner. Effective June 25, 2003.

DUGS60263 Special Assistant to the Assistant Secretary for Public Affairs. Effective June 27, 2003.

DUGS60314 Staff Assistant to the Senior Advisor to the Deputy Secretary. Effective July 15, 2003.

DUGS60460 Assistant to the Secretary and White House Liaison to the Deputy Secretary, Housing and Urban Development. Effective August 20, 2003.

DUGS60143 Faith-Based and Community Initiatives Coordinator to the Director, Center for Faith-Based and Community Initiatives. Effective September 10, 2003.

DUGS60461 Staff Assistant to the Secretary, Housing and Urban Development. Effective September 10, 2003.

DUGS60279 Associate Deputy Assistant Secretary for Fair Housing and Equal Opportunity to the Assistant Secretary for Fair Housing and Equal Opportunity. Effective September 29, 2003.

DUGS60463 Executive Secretary to the Assistant Secretary for Administration. Effective September 30, 2003.

Section 213.3391 Office of Personnel Management

PMGS00037 Chief, Office of House Affairs, to the Director, Office of Congressional Relations. Effective June 25, 2003.

PMGS00040 Chief of Administration and Confidential Assistant to the Director, Office of Congressional Relations. Effective July 18, 2003.

PMGS00042 Special Assistant to the Deputy Director. Effective July 22, 2003

PMGS00041 Special Assistant (Senior Speech Writer) to the Director, Office of Communications. Effective August 11, 2003.

PMGS00039 Special Assistant to the Chief of Staff. Effective August 18, 2003.

PMGS00043 White House Liaison to the Chief of Staff. Effective August 25, 2003.

Section 213.3392 Federal Labor Relation Authority

FAGS6022 Executive Assistant to the Chairman. Effective August 28, 2003.

Section 213.3394 Department of Transportation

DTGS60003 Special Assistant to the Secretary and Deputy Director for Scheduling and Advance to the Secretary. Effective June 12, 2003.

DTGS60363 Director of Policy and Program Support to the Administrator. Effective July 11, 2003.

DTGS60251 Senior Policy Advisor to the Administrator. Effective August 11, 2003.

DTOT60366 Special Assistant to the Deputy Administrator for National Parks

Air Tour Management to the Deputy Administrator. Effective August 19, 2003.

DTGS60017 Assistant to the Secretary for Policy to the Secretary. Effective September 3, 2003.

DTGS60279 Associate Director for Speechwriting to the Assistant to the Secretary and Director of Public Affairs. Effective September 3, 2003.

DTGS60070 Special Assistant to the Assistant Secretary for Governmental Affairs. Effective September 23, 2003.

Section 213.3396 National Transportation Safety Board

TBGS60003 Special Assistant to the Chairman. Effective August 27, 2003.

TBGS60093 Confidential Assistant to a Member. Effective September 17, 2003.

Section 213.3397 Federal Housing Finance Board

FBOT00003 Special Assistant for External Affairs to the Chairman. Effective June 16, 2003.

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577; 3 CFR 1954–1958 Comp., P. 218.

Office of Personnel Management.

Kay Coles James,

Director.

[FR Doc. 03–28314 Filed 11–10–03; 8:45 am]

BILLING CODE 6325–38–U

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee; Open Committee Meetings

According to the provisions of section 10 of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that meetings of the Federal Prevailing Rate Advisory Committee will be held on—

Thursday, November 20, 2003;
Thursday, December 4, 2003; and
Thursday, December 18, 2003.

The meetings will start at 10 a.m. and will be held in Room 5A06A, Office of Personnel Management Building, 1900 E Street, NW., Washington, DC.

The Federal Prevailing Rate Advisory Committee is composed of a Chair, five representatives from labor unions holding exclusive bargaining rights for Federal blue-collar employees, and five representatives from Federal agencies. Entitlement to membership on the Committee is provided for in 5 U.S.C. 5347.

The Committee's primary responsibility is to review the Prevailing Rate System and other matters pertinent to establishing prevailing rates under subchapter IV, chapter 53, 5 U.S.C., as

amended, and from time to time advise the Office of Personnel Management.

This scheduled meeting will start in open session with both labor and management representatives attending. During the meeting either the labor members or the management members may caucus separately with the Chair to devise strategy and formulate positions. Premature disclosure of the matters discussed in these caucuses would unacceptably impair the ability of the Committee to reach a consensus on the matters being considered and would disrupt substantially the disposition of its business. Therefore, these caucuses will be closed to the public because of a determination made by the Director of the Office of Personnel Management under the provisions of section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463) and 5 U.S.C. 552b(c)(9)(B). These caucuses may, depending on the issues involved, constitute a substantial portion of a meeting.

Annually, the Chair compiles a report of pay issues discussed and concluded recommendations. These reports are available to the public, upon written request to the Committee's Secretary.

The public is invited to submit material in writing to the Chair on Federal Wage System pay matters felt to be deserving of the Committee's attention. Additional information on this meeting may be obtained by contacting the Committee's Secretary, Office of Personnel Management, Federal Prevailing Rate Advisory Committee, Room 5538, 1900 E Street, NW., Washington, DC 20415, (202) 606–1500.

Dated: November 5, 2003.

Mary M. Rose,

Chairperson, Federal Prevailing Rate Advisory Committee.

[FR Doc. 03–28313 Filed 11–10–03; 8:45 am]

BILLING CODE 6325–49–P

OFFICE OF PERSONNEL MANAGEMENT

SES Performance Review Board

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: Notice is hereby given of the appointment of members of the OPM Performance Review Board.

FOR FURTHER INFORMATION CONTACT:

Teresa Floyd, Human Capital Management Services Group, Office of Personnel Management, 1900 E Street NW., Washington, DC 20415, (202) 606–2309.

SUPPLEMENTARY INFORMATION: Section 4314(c) (1) through (5) of Title 5, U.S.C., requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more SES performance review boards. The board reviews and evaluates the initial appraisal of a senior executive's performance by the supervisor, and considers recommendations to the appointing authority regarding the performance of the senior executive.

Office of Personnel Management.

Kay Coles James,

Director.

The following have been designated as regular members of the Performance Review Board of the Office of Personnel Management:

Paul T. Conway, Chief of Staff—Chair
Stephen C. Benowitz, Associate Director for Human Resources Products and Services

Steven R. Cohen, Homeland Security Liaison Officer

John C. Gartland, Director, Office of Congressional Relations

Doris L. Hausser, Senior Policy Advisor to the Director and Chief Human Capital Officer

Vicki A. Novak, Assistant Administrator for Human Resources and Education, National Aeronautics Space Administration

Marta B. Perez, Associate Director for Human Capital Leadership and Merit System Accountability

Eric M. Thorson, Senior Advisor for Investigative Operations and Agency Planning

Mark A. Robbins, General Counsel

[FR Doc. 03–28395 Filed 11–7–03; 8:45 am]

BILLING CODE 6325–45–P

PRESIDIO TRUST

Public Health Service Hospital, The Presidio of San Francisco (Presidio), California; Extension of Public Scoping Period

ACTION: The Presidio Trust (Trust) is extending the public scoping period from November 26, 2003 to December 10, 2003 and adding a second public meeting on December 10, 2003 to provide greater opportunities for public and agency participation in the Public Health Service Hospital (PHSH) project's environmental review process under the National Environmental Policy Act (NEPA).

SUPPLEMENTARY INFORMATION: On September 9, 2003, the Trust published a notice in the **Federal Register**

announcing the start of public scoping and its intention to prepare an environmental assessment (EA) under the NEPA for the proposed rehabilitation and reuse of historic buildings in the PHS district of the Presidio (68 FR 53205-06). As part of the EA scoping process and as announced in the notice, the Trust held a public Trust Board meeting on October 29, 2003 to accept oral comments on the scope of alternatives and environmental impacts to be considered in the EA. The public scoping period, as first announced, ends November 26, 2003. The Trust desires to provide additional opportunities for public and agency comment on the project beyond what was first announced.

At the public meeting on October 29, 2003, the Trust announced to meeting participants the scheduling of a second opportunity for the public to address the Board directly on the PHS project. Through this **Federal Register** notice and other public means, the Trust is more broadly announcing the second public Trust Board meeting and is extending the public comment period on the EA to December 10, 2003.

Scoping Meeting and Comments: The Trust will accept additional oral comments on the scope of alternatives and issues to be addressed under the NEPA in the PHS EA at a public Trust Board meeting on December 10, 2003, the exact time and location to be announced. The deadline for all scoping comments on the EA is also December 10, 2003. Written scoping comments must be postmarked, transmitted or delivered no later than December 10, 2003 to the Trust contact person below. Please note that written comments will be made available to the public.

FOR FURTHER INFORMATION CONTACT: John Pelka, NEPA Compliance Coordinator, the Presidio Trust, 34 Graham Street, P.O. Box 29052, San Francisco, CA 94129-0052 (fax: 415/561-2790) or phsh@presidiotrust.gov.

Dated: November 5, 2003.

Karen A. Cook,
General Counsel.

[FR Doc. 03-28290 Filed 11-10-03; 8:45 am]

BILLING CODE 4310-4R-P

RAILROAD RETIREMENT BOARD

Privacy Act of 1974; Proposed Changes to System of Records

AGENCY: Railroad Retirement Board (RRB).

ACTION: Notice of revision of Privacy Act System of Records.

SUMMARY: The purpose of this document is to give notice of two proposed new routine uses for one of its system of records.

DATES: The changes to this System of Records shall become effective without further notice December 22, 2003, unless comments are received before this date that result in further modifications.

ADDRESSES: Send comments to Beatrice Ezerski, Secretary to the Board, Railroad Retirement Board, 844 N. Rush St., Chicago, Illinois 60611-2092.

FOR FURTHER INFORMATION CONTACT: Patricia A. Marshall, Counsel to the Inspector General, Office of Inspector General, Railroad Retirement Board, 844 N. Rush St., 4th Floor, Chicago, Illinois 60611-2092, (312) 751-4690.

SUPPLEMENTARY INFORMATION: The RRB proposes two new routine uses for its Investigation Files System of Records, RRB-43.

I. Discussion of New and Revised Routine Uses

The first proposed routine use "e" in RRB-43 would permit the RRB to disclose information, upon request, to the President's Counsel on Integrity and Efficiency (PCIE) for the purpose of accurate reporting to the President and Congress on the activities of the Inspectors General. The purpose of the disclosure of information is to allow the PCIE to conduct the necessary analysis of data from all Inspector General offices to develop accurate statistical information for the annual report. In general, only portions of personally identifiable information may be disclosed. Additionally personally identifiable information may be disclosed as necessary to reconcile reports.

The second proposed routine use "f" in RRB-43 would allow the disclosure of information to members of the PCIE or the Department of Justice, as necessary, for the purpose of investigative qualitative assessment reviews. The PCIE has established a peer review process to ensure that Offices of Inspectors General have adequate internal safeguards and management procedures. The objectives of the review are to assess whether adequate internal safeguards and management procedures are in place, foster high-quality investigations and investigative processes, ensure that the highest levels of professionalism are maintained, and promote consistency in investigative standards and practices within the Inspector General investigative community. The Inspectors Generals plan to begin

investigative qualitative assessment reviews beginning during fiscal year 2004.

II. Compatibility of Proposed Routine Uses

We are proposing these two new routine uses in accordance with the Privacy Act (5 U.S.C. 552a(b)(3)). The Privacy Act permits the disclosure of information about individuals without their consent for a routine use where the information will be used for a purpose which is compatible with the purpose for which the information was originally collected. The Office of Management and Budget had offered guidance that a "compatible" use is a use which is necessary and proper. The RRB considers the disclosure of investigatory records for the purpose of accurate reporting to the President and Congress on the activities of the Inspectors General to be a necessary and proper use; likewise the RRB considers the disclosure of these records to members of the PCIE or the Department of Justice, as necessary, for the purpose of investigative qualitative assessment reviews to be a necessary and proper use.

III. Altered System Report

On October 28, 2003, the Railroad Retirement Board filed an altered system report for this system with the chairmen of the designated Senate and House committees and with the Office of Management and Budget. This was done to comply with section 3 of the Privacy Act of 1974 and OMB Circular 1-130, Appendix I.

By authority of the Board.

Beatrice Ezerski,
Secretary to the Board.

RRB-43

SYSTEM NAME:

Investigation Files—RRB.

* * * * *

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Paragraph "e" is added to read as follows:

e. Records may be disclosed to members of the President's Council on Integrity and Efficiency for the preparation of reports to the President and Congress on the activities of the Inspectors General.

Paragraph "f" is added to read as follows:

f. Records may be disclosed to members of the President's Council on Integrity and Efficiency, or the Department of Justice, as necessary, for

the purpose of conducting qualitative assessment reviews of the investigative operations of RRB-OIG to ensure that adequate internal safeguards and management procedures are maintained.

[FR Doc. 03-28226 Filed 11-10-03; 8:45 am]

BILLING CODE 7905-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35-27747]

Filings Under the Public Utility Holding Company Act of 1935, as Amended ("Act")

November 5, 2003.

Notice is hereby given that the following filing(s) has/have been made with the Commission under provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by December 1, 2003, to the Secretary, Securities and Exchange Commission, Washington, DC 20549-0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After December 1, 2003 the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

E.ON AG and LG&E Energy Corp. (70-10173)

E.ON AG ("E.ON"), E.ON-Platz 1, 40479 Dusseldorf, Germany, a registered holding company, and LG&E Energy Corp. ("LG&E Energy"), 220 West Main Street, Louisville, Kentucky 40202, a subsidiary of E.ON and a public utility holding company exempt from registration by order under section 3(a)(1) of the Act (collectively "Applicants"), have filed an application ("Application") under sections 9(a) and 10 of the Act and rule 54 under the Act.

Applicants request an extension of the deadline to divest E.ON's nonutility interest in CRC-Evans International, Inc. and its subsidiaries.

On December 11, 2000, Powergen plc ("Powergen") acquired LG&E Energy,¹ an exempt holding company under the Act, in accordance with the Commission's order in Holding Company Act Release No. 27291 (December 6, 2000) (the "Powergen Order"). In the Powergen Order, the Commission reserved jurisdiction over the retention of CRC-Evans International, Inc. and its subsidiaries. The subsidiaries of CRC-Evans International, Inc. include: CRC-Evans Pipeline International, Inc.; CRC-Evans Weighting Systems Inc. (formerly known as CRC-Key, Inc.); CRC-Evans B.V.; CRC-Evans Canada Ltd.; PIH Holdings Ltd.; and Pipeline Induction Heat Ltd. (collectively, the "CRC-Evans Companies"). The CRC-Evans Companies are indirect, wholly-owned subsidiaries of E.ON, which provide specialized equipment and services for construction of crude oil, natural gas, refined product and water pipelines worldwide.

The Commission authorized E.ON's acquisition of Powergen in an order issued on June 14, 2002 (Holding Company Act Release No. 27539) (the "Acquisition Order"). E.ON completed the acquisition of Powergen on July 1, 2002 and registered as a holding company on that day.

In the Powergen Order, applicants committed to take appropriate steps to divest CRC-Evans Companies within three years after the date of the order in that proceeding or to file a post-effective amendment to the application in such proceeding no later than June 30, 2001, seeking to justify the retention of such companies. No such post-effective amendment was filed.

Again in the Acquisition Order, Applicants committed to take appropriate steps to divest these companies within three years after the date of the Powergen Order, or by December 6, 2003. In the Acquisition Order, the Commission continued to reserve jurisdiction over the retention of the CRC-Evans Companies.

Applicants state that they have made a concerted effort to dispose of the CRC-Evans Companies, but that depressed market conditions in the pipeline construction industry have had a negative impact on the marketability of the CRC-Evans Companies. Applicants state that although the overall weakness

in the market is expected to continue into 2004, industry sources suggest that activity levels in the pipeline industry should improve as the industry recovers from a cyclical trough and liquidity issues. Accordingly, Applicants request an extension of the time to accomplish divestiture of the CRC-Evans Companies until December 31, 2005.

National Fuel Gas Company, et al. (70-10168)

National Fuel Gas Company ("National Fuel Gas"), a registered holding company, and its nonutility subsidiaries ("Nonutility Subsidiaries") National Fuel Gas Supply Corporation ("Supply"), Empire State Pipeline ("Empire"), Upstate Energy Inc. ("Upstate"), all at 10 Lafayette Square, Buffalo, New York 14203, National Fuel Resources, Inc. ("Resources"), 165 Lawrence Bell Drive, Suite 120, Williamsville, New York 14221, and Seneca Resources Corporation, 1201 Louisiana Street, Suite 400, Houston, Texas 77002 ("Seneca" and collectively, "Applicants"), have filed an application-declaration with the Commission under sections 6(a), 7, 9(a), 10, 12(c) and 12(f) of the Act and rules 23, 45, 46 and 54 under the Act.

I. Background

A. Applicants

National Fuel Gas, through its direct and indirect subsidiaries, is engaged in all phases of the natural gas business: Exploration, production, purchasing, gathering, processing, transportation, storage, retail distribution and wholesale and retail marketing. The company owns all of the issued and outstanding common stock of National Fuel Gas Distribution Corporation ("Distribution"), a gas-utility company that distributes natural gas at retail to approximately 732,000 residential, commercial and industrial customers (including transportation-only customers) in portions of western New York and northwestern Pennsylvania. For the twelve months ended June 30, 2003, National Fuel Gas had operating revenues of approximately \$2 billion, of which \$1.1 were attributable to regulated gas utility sales, \$200 million to pipeline and storage operations, and \$300 million to exploration and production activities. As of June 30, 2003, National Fuel Gas and its subsidiaries had total assets valued at approximately \$3.8 billion, including \$1.3 billion in net utility (i.e., distribution) plant, \$786 million in net pipeline and storage plant, and \$1.1 billion in net exploration and

¹ LG&E Energy owns two public utility subsidiaries: Louisville Gas and Electric Company and Kentucky Utilities Company.

production property, plant and equipment.

Supply, an interstate pipeline company, transports and stores natural gas for Distribution and for other utilities, pipelines, marketers and large industrial customers in the northeastern United States. Supply owns and operates a 2,900-mile pipeline network that extends generally from southwestern Pennsylvania to the U.S.-Canadian border at Niagara Falls. It is regulated by the Federal Energy Regulatory Commission as a natural gas company under the Natural Gas Act of 1938.

Empire, an intrastate pipeline company, transports natural gas for Distribution and for other utilities, large industrial customers and power producers in New York State. The company owns a 157-mile pipeline that extends generally from the U.S.-Canadian border at the Chippawa Channel of the Niagara River near Buffalo, N.Y. to near Syracuse, N.Y., and is regulated by the New York Public Service Commission.

Seneca is engaged in the business of exploration and development of natural gas and oil producing reserves in California, in the Appalachian region of the United States, in Wyoming and in the Gulf Coast region of Texas and Louisiana. In addition, Seneca conducts exploration and production operations through subsidiaries in the provinces of Manitoba, Alberta, Saskatchewan and British Columbia in Canada.

Resources markets natural gas to approximately 22,000 industrial, commercial and residential customers under long-term agreements, and provides other related energy services to those end-use customers. Upstate Energy engages through subsidiaries in gas marketing and related activities, and is a "gas-related company" within the meaning of rule 58. Neither Resources nor Upstate Energy owns or operates facilities for the distribution of gas at retail or for the generation, transmission or distribution of electricity for sale.

B. Existing Authority

By order dated December 16, 1999 (HCAR No. 27114, "December 1999 Order"), the Commission authorized National Fuel Gas, through Supply, Resources, Seneca and Upstate, to acquire the equity and debt securities of one or more companies that are engaged in or are formed to engage in certain categories of non-utility gas-related operations outside the United States ("Foreign Energy Affiliates"). Specifically, the Commission authorized National and the Nonutility Subsidiaries (except as described below) to invest up

to \$300 million through December 31, 2003 in the securities of Foreign Energy Affiliates, and authorized Resources and Upstate Energy to engage directly in marketing and brokering and related activities in Canada.²

By order dated December 27, 2000 (HCAR No. 27320, "December 2000 Order"), the Commission modified the December 1999 Order to authorize National Fuel Gas to invest up to an aggregate amount of \$800 million (from \$300 million) in Foreign Energy Affiliates.

II. Requests for Authority

Applicants now request authority for National Fuel Gas to acquire directly, or indirectly through the Nonutility Subsidiaries, one or more newly organized direct subsidiaries of National Fuel Gas or one or more subsidiaries of the Nonutility Subsidiaries ("Intermediate Subsidiaries"), the securities of or other interests in Foreign Energy Affiliates through December 31, 2006 ("Authorization Period"). The aggregate amount invested by National Fuel Gas and its subsidiaries in Foreign Energy Affiliates would not exceed \$800 million. Applicants state that, generally, the operations of Foreign Energy Affiliates would be substantially similar to those that the Nonutility Subsidiaries are now directly engaged in within the United States.

Applicants request authority for Resources and Upstate to engage directly in marketing and brokering and related activities in Canada.

Applicants request authority during the Authorization Period for the Nonutility Subsidiaries, Intermediate Subsidiaries, and Foreign Energy Affiliates to: (1) Pay dividends out of capital and unearned surplus; and (2) retire or reacquire any securities that have been issued to an associate company.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jill M. Peterson,
Assistant Secretary.

[FR Doc. 03-28335 Filed 11-10-03; 8:45 am]

BILLING CODE 8010-01-P

² The Commission reserved jurisdiction, pending completion of the record, over: (1) Investments by Seneca in Foreign Energy Affiliates that are engaged in exploration and production activities outside of the United States and Canada; (2) any investment by Supply in a Foreign Energy Affiliate; (3) direct energy commodity marketing and brokering by Resources and Upstate Energy outside the United States and Canada; and (4) investments by Resources and Upstate Energy in Foreign Energy Affiliates that are engaged in Energy Commodity marketing and brokering activities outside of the United States and Canada.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48745; File Nos. SR-NYSE-2002-33, SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, and SR-NASD-2002-141]

Self-Regulatory Organizations; New York Stock Exchange, Inc. and National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Changes (SR-NYSE-2002-33 and SR-NASD-2002-141) and Amendments No. 1 Thereto; Order Approving Proposed Rule Changes (SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138 and SR-NASD-2002-139) and Amendments No. 1 to SR-NASD-2002-80 and SR-NASD-2002-139; and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 2 and 3 to SR-NYSE-2002-33, Amendment Nos. 2, 3, 4 and 5 to SR-NASD-2002-141, Amendment Nos. 2 and 3 to SR-NASD-2002-80, Amendment Nos. 1, 2, and 3 to SR-NASD-2002-138, and Amendment No. 2 to SR-NASD-2002-139, Relating to Corporate Governance

November 4, 2003.

I. Introduction

On August 16, 2002, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change (SR-NYSE-2002-33) to amend its Listed Company Manual ("NYSE Manual") to implement significant changes to its listing standards that are aimed to ensure the independence of directors of listed companies and to strengthen corporate governance practices of listed companies ("NYSE Corporate Governance Proposal"). On April 4, 2003, the NYSE submitted Amendment No. 1 to the NYSE Corporate Governance Proposal.³ On April 17, 2003, the proposed rule change, as amended by NYSE Amendment No. 1, was published for comment in the *Federal Register*.⁴ The

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated April 3, 2003 ("NYSE Amendment No. 1"). NYSE Amendment No. 1 replaced the original filing in its entirety. Telephone call between Annemarie Tierney, Office of General Counsel, NYSE, and Jennifer Lewis, Special Counsel, Division, Commission, on April 9, 2003.

⁴ See Securities Exchange Act Release No. 47672 (April 11, 2003), 68 FR 19051 ("NYSE Notice").

Commission received 68 comment letters on the NYSE proposal.⁵ On October 8, 2003, the NYSE filed Amendment No. 2 to the NYSE Corporate Governance Proposal.⁶ On October 20, 2003, the NYSE filed Amendment No. 3 to the NYSE Corporate Governance Proposal.⁷

On October 9, 2002, the NASD, through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Commission, pursuant to section 19(b)(1) of the Exchange Act, and Rule 19b-4 thereunder, a proposed rule change (SR-NASD-2002-141) to amend NASD Rules 4200 and 4350(c) and (d) to modify requirements relating to board independence and independent committees ("Nasdaq Independent Director Proposal"). On March 11, 2003, NASD, through Nasdaq, filed Amendment No. 1 to the Nasdaq Independent Director Proposal.⁸ On March 25, 2003, the proposed rule change, as amended by Amendment No. 1 to the Nasdaq Independent Director Proposal, was published for comment in the **Federal Register**.⁹ The Commission received 24 comment letters on the Nasdaq Independent Director Proposal.¹⁰ On July 16, 2003, Nasdaq filed Amendment No. 2 to the Nasdaq Independent Director Proposal.¹¹ On

October 10, 2003, Nasdaq filed Amendment No. 3 to the Nasdaq Independent Director Proposal.¹² On October 16, 2003, Nasdaq filed Amendment No. 4 to the Nasdaq Independent Director Proposal.¹³ On October 30, 2003, Nasdaq filed Amendment No. 5 to the Independent Director Proposal.¹⁴ On June 11, 2002, the NASD, through Nasdaq, filed with the Commission, pursuant to section 19(b)(1) of the Exchange Act, and Rule 19b-4 thereunder, a proposed rule change (SR-NASD-2002-77) to amend NASD Rule 4350(b) to add a requirement for issuers to announce publicly any audit opinions with going concern qualifications ("Nasdaq Going Concern Proposal"). On July 10, 2003, the NASD Going Concern Proposal was published for comment in the **Federal Register**.¹⁵ The Commission received no comments on the proposal.

On June 11, 2002, the NASD, through Nasdaq, filed with the Commission, pursuant to section 19(b)(1) of the Exchange Act, and Rule 19b-4 thereunder, a proposed rule change (SR-NASD-2002-80) to amend NASD Rule 4350(h) to require an issuer's audit committee or another independent body of the board of directors to approve related party transactions ("Nasdaq Related Party Transactions Proposal"). On December 30, 2002, the NASD, through Nasdaq, submitted Amendment No. 1 to the Nasdaq Related Party Transactions Proposal.¹⁶ On July 16, 2003, the proposed rule change, as

amended, was published for comment in the **Federal Register**.¹⁷ The Commission received no comments on the proposal. On October 3, 2003, the NASD, through Nasdaq, submitted Amendment No. 2 to the Nasdaq Related Party Transactions Proposal.¹⁸ On October 6, 2003, the NASD, through Nasdaq, submitted Amendment No. 3 to the Nasdaq Related Party Transactions Proposal.¹⁹

On October 9, 2002, the NASD, through Nasdaq, filed with the Commission, pursuant to section 19(b)(1) of the Exchange Act, and Rule 19b-4 thereunder, a proposed rule change (SR-NASD-2002-138) to amend NASD Rule 4350(a) to require foreign issuers to disclose any exemptions they may receive from Nasdaq's corporate governance listing standards ("Nasdaq Issuer Applicability Proposal"). On July 10, 2003, the Nasdaq Issuer Applicability Proposal was published for comment in the **Federal Register**.²⁰ The Commission received one comment letter on the Nasdaq Issuer Applicability Proposal.²¹ On August 15, 2003, the NASD, through Nasdaq, submitted Amendment No. 1 to the Nasdaq Issuer Applicability Proposal.²² On October 10, 2003, the NASD, through Nasdaq, submitted Amendment No. 2 to the Nasdaq Issuer Applicability Proposal.²³

⁵ A list of commenters on the rule proposals of the NYSE and the National Association of Securities Dealers, Inc. ("NASD"), who submitted correspondence as of October 13, 2003, is attached as Exhibit A to this order. The public files for the NYSE and NASD rule proposals, including all comment letters received on the proposals, are located at the Commission's Public Reference Room, 450 Fifth Street, NW, Washington DC 20549-0102. See *infra*, note.

⁶ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division, Commission, dated October 8, 2003 ("NYSE Amendment No. 2"). NYSE Amendment No. 2 amended portions of the proposal as described below.

⁷ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division, Commission, dated October 17, 2003 ("NYSE Amendment No. 3"). In Amendment No. 3, NYSE proposed to require that the audit committee charter of a closed-end or open-end management investment company address the responsibility of the audit committee to establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters, but not to require the procedures to be set forth in the charter, as would have been required under Amendment No. 2.

⁸ See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated March 11, 2003. Amendment No. 1 to the Nasdaq Independent Director Proposal replaced the original filing in its entirety.

⁹ See Securities Exchange Act Release No. 47516 (March 17, 2003), 68 FR 14451.

¹⁰ See *supra* note.

¹¹ See letter from Sara Nelson Bloom, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated July 15, 2003.

¹² See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated October 9, 2003. Amendment No. 3 to the Nasdaq Independent Director Proposal replaced in full the Nasdaq Independent Director Proposal and Amendment Nos. 1 and 2 thereto. See Section IV. *infra*, describing aspects of the proposed revisions.

¹³ See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated October 15, 2003. Amendment No. 4 to the Nasdaq Independent Director Proposal made several revisions to the narrative section of the previous amendment.

¹⁴ See letter from Sara Nelson Bloom, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated October 29, 2003. Amendment No. 5 to the Nasdaq Independent Director Proposal related to the proposed requirement that investment company audit committees establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters. Amendment No. 5 removed a sentence in the narrative section of the proposal that stated that the procedures would be required to be set forth in the audit committee charter.

¹⁵ See Securities Exchange Act Release No. 48123 (July 2, 2003), 68 FR 41191 ("Nasdaq Notice").

¹⁶ See letter from John D. Nachman, Senior Attorney, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated December 30, 2002.

¹⁷ See Securities Exchange Act Release No. 48137 (July 8, 2003), 68 FR 42152.

¹⁸ See letter from John D. Nachman, Senior Attorney, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated October 2, 2003. In Amendment No. 2 to the Nasdaq Related Party Transactions Proposal, Nasdaq proposed to (1) add language to NASD Rule 4350(h) to clarify that each issuer shall conduct an appropriate review of all related party transactions for potential conflict of interest situations, and (2) require that the rule change become effective 60 days following Commission approval.

¹⁹ See letter from John D. Nachman, Senior Attorney, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated October 3, 2003. In Amendment No. 3 to the Nasdaq Related Party Transactions Proposal, Nasdaq proposed that the rule change become effective on January 15, 2004.

²⁰ See Securities Exchange Act Release No. 48124 (July 2, 2003), 68 FR 41193.

²¹ See *supra* note.

²² See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated August 15, 2003. Amendment No. 1 replaced in full the Nasdaq Issuer Applicability Proposal. In Amendment No. 1 to the Nasdaq Issuer Applicability Proposal, Nasdaq proposed to exempt registered management investment companies, asset-backed issuers and other passive issuers, and cooperatives from most provisions of NASD Rule 4350.

²³ See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated October 9, 2003. Amendment No. 2 replaced in full the Nasdaq Issuer Applicability Proposal and Amendment No. 1

On October 23, 2003, the NASD, through Nasdaq, submitted Amendment No. 3 to the Nasdaq Issuer Applicability Proposal.²⁴

On October 10, 2002, the NASD, through Nasdaq, filed with the Commission, pursuant to section 19(b)(1) of the Exchange Act, and Rule 194-4 thereunder, a proposed rule change (SR-NASD-2002-139) to amend NASD Rule 4350(n) to require listed companies to adopt a code of conduct for all directors, officers, and employees ("Nasdaq Code of Conduct Proposal"). On January 15, 2003, the NASD, through Nasdaq, submitted Amendment No. 1 to the Nasdaq Code of Conduct Proposal.²⁵ On July 10, 2003, the proposed rule change, as amended, was published for comment in the **Federal Register**.²⁶ The Commission received two comment letters on the Nasdaq Code of Conduct Proposal.²⁷ On October 6, 2003, the NASD, through Nasdaq, submitted Amendment No. 2 to the Nasdaq Code of Conduct Proposal.²⁸ This order

thereto. In Amendment No. 2 to the Issuer Applicability Proposal, Nasdaq proposed to clarify that (1) Investment companies (including business development companies) are subject to all the requirements of NASD Rule 4350, except that registered management investment companies are exempt from the requirements of NASD Rule 4350(c); (2) asset-backed issuers and certain other passive issuers are exempt from the requirements of NASD Rule 4350(c) and (d); and (3) certain cooperative entities are exempt from NASD Rule 4350(c), however, each of these entities must comply with all federal securities laws, including without limitation, section 10A(m) of the Exchange Act and Rule 10A-3 thereunder.

²⁴ See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated October 23, 2003. Amendment No. 3 replaced in full the Nasdaq Issuer Applicability Proposal and Amendment Nos. 1 and 2 thereto. In Amendment No. 3 to the Nasdaq Issuer Applicability Proposal, Nasdaq proposed to set forth the dates by which companies would be required to come into compliance with the proposed rule changes that are the subject of this Order; add new Rules 4200A and 4350A to incorporate the sections of Rules 4200 and 4350 that would continue to apply until the proposed rule changes become effective; and exempt registered management investment companies, asset-backed issuers, and unit investment trusts from the requirement of proposed subsection (n) of NASD Rule 4350 regarding codes of conduct.

²⁵ See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated January 15, 2003.

²⁶ See Securities Exchange Act Release No. 48125 (July 2, 2003), 68 FR 41194.

²⁷ See *supra* note.

²⁸ See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated October 3, 2003. In Amendment No. 2 to the Nasdaq Code of Conduct Proposal, Nasdaq proposed to re-letter the section of NASD Rule 4350 addressing the code of conduct requirement as subsection (n), add cross-references to 17 CFR 228.406 and 17 CFR 229.406, and clarify that any waivers of the code for directors or

approves the NYSE Corporate Governance Proposal, as amended by NYSE Amendment Nos. 1, 2, and 3; the Nasdaq Independent Director Proposal, as amended by Amendment Nos. 1, 2, 3, 4, and 5 to the Nasdaq Independent Director Proposal; the Nasdaq Going Concern Proposal; the Nasdaq Related Party Transactions Proposal, as amended by Amendment Nos. 1, 2, and 3 to that proposal; the Nasdaq Issuer Applicability Proposal, as amended by Amendment Nos. 1, 2, and 3 to that proposal; and the Nasdaq Code of Conduct Proposal, as amended by Amendment Nos. 1 and 2 to that proposal. The Commission is granting accelerated approval to Amendment Nos. 2 and 3 to the NYSE Corporate Governance Proposal, Amendment Nos. 2, 3, 4, and 5 to the Nasdaq Independent Director Proposal, Amendment Nos. 2 and 3 to the Nasdaq Related Party Transactions Proposal, Amendment Nos. 1, 2, and 3 to the Nasdaq Issuer Applicability Proposal, and Amendment No. 2 to the Nasdaq Code of Conduct Proposal, as discussed below, and is soliciting comments from interested persons on these amendments.

II. Description of the NYSE and Nasdaq Proposals

A. History

In 1998, the NYSE and NASD sponsored a committee to study the effectiveness of audit committees. This committee became known as the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees ("Blue Ribbon Committee"). In its 1999 report, the Blue Ribbon Committee recognized the importance of audit committees and issued ten recommendations to enhance their effectiveness.²⁹ In response to these recommendations, the NYSE and the NASD, as well as other exchanges, revised their listing standards relating to audit committees.³⁰ In February 2002, in light of several high-profile corporate failures, the Commission's Chairman at that time requested that the NYSE and NASD, as well as the other exchanges, review their listing standards, with an

executive officers would be required to be disclosed in a Form 8-K within five days.

²⁹ See Report and Recommendations of the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees (February 1999). The Blue Ribbon Committee Report is available at <http://www.nyse.com>.

³⁰ See Securities Exchange Act Release Nos. 42233 (December 14, 1999), 64 FR 71529 (December 21, 1999) (NYSE); 42231 (December 14, 1999), 64 FR 71523 (December 21, 1999) (NASDAQ); 42232 (December 14, 1999), 64 FR 71518 (December 21, 1999) (American Stock Exchange); 43941 (February 7, 2001), 66 FR 10545 (February 15, 2001) (Pacific Exchange).

emphasis this time on all corporate governance listing standards, and not just those provisions relating to audit committees.³¹ After reviewing their corporate governance listing standards, the NYSE and the NASD, through Nasdaq, filed corporate governance reform proposals with the Commission in 2002.³²

In January 2003, pursuant to the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act"),³³ the Commission proposed Rule 10A-3 under the Exchange Act,³⁴ which directs each national securities exchange and national securities association to prohibit the listing of any security of an issuer that is not in compliance with the audit committee requirements specified in Rule 10A-3. Because the provisions concerning audit committees in the NYSE and Nasdaq corporate governance reform proposals, as filed with the Commission, did not conform in all respects with the audit committee requirements set forth in Rule 10A-3 as proposed by the Commission, both the NYSE and Nasdaq revised their proposals.³⁵ In April 2003, the Commission adopted Rule 10A-3.³⁶ In order to conform their proposals to the requirements of final Rule 10A-3, and to incorporate comments from the public and revisions suggested by the Commission's staff, the NYSE and Nasdaq each filed further amendments to their proposals.³⁷ Significant aspects of the proposed rule changes, as amended, are described below.

B. NYSE Proposals

According to the NYSE, the NYSE Corporate Governance Proposal is designed to further the ability of honest and well-intentioned directors, officers, and employees of listed issuers to perform their functions effectively. The NYSE believes that the proposal also will allow shareholders to more easily and efficiently monitor the performance of companies and directors in order to reduce instances of lax and unethical behavior.³⁸

³¹ See Commission Press Release No. 2002-23 (February 13, 2002).

³² See File Nos. SR-NYSE-2002-33, SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, SR-NASD-2002-141.

³³ Pub. L. 107-204, 116 Stat. 745 (2002).

³⁴ See Securities Exchange Act Release No. 47137 (January 8, 2003), 68 FR 2637, (January 17, 2003).

³⁵ See NYSE Amendment No. 1, *supra* note 3, and Amendment No. 1 to the Nasdaq Independent Director Proposal, *supra* note 8.

³⁶ 17 CFR 240.10A-3.

³⁷ See NYSE Amendment Nos. 2 and 3, *supra* notes 6 and 7; and NASD Amendment Nos. 2, 3, and 4, *supra* notes 11, 12, and 13 respectively.

³⁸ See NYSE Corporate Governance Proposal.

1. Independence of Majority of Board Members

NYSE section 303A(1) of the NYSE Manual would require the board of directors of each listed company to consist of a majority of independent directors.³⁹ Pursuant to NYSE section 303A(2) of the NYSE Manual, no director would qualify as “independent” unless the board affirmatively determines that the director has no material relationship with the company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company). The company would be required to disclose the basis for such determination in its annual proxy statement or, if the company does not file an annual proxy statement, in the company’s annual report on Form 10-K⁴⁰ filed with the Commission.⁴¹ In complying with this requirement, a board would be permitted to adopt and disclose standards to assist it in making determinations of independence, disclose those standards, and then make the general statement that the independent directors meet those standards.⁴²

2. Definition of Independent Director

In addition, the NYSE proposes to tighten its current definition of independent director as follows. First, a director who is an employee, or whose immediate family member is an executive officer, of the company would not be independent until three years after the end of such employment relationship (“NYSE Employee Provision”).⁴³ Employment as an interim Chairman or CEO would not disqualify a director from being considered independent following that employment.⁴⁴ Second, a director who receives, or whose immediate family member receives, more than \$100,000

per year in direct compensation from the listed company, except for certain permitted payments,⁴⁵ would not be independent until three years after he or she ceases to receive more than \$100,000 per year in such compensation (“NYSE Direct Compensation Provision”).⁴⁶

Third, a director who is affiliated with or employed by, or whose immediate family member is affiliated with or employed in a professional capacity by, a present or former internal or external auditor of the company would not be independent until three years after the end of the affiliation or the employment or auditing relationship.⁴⁷

Fourth, a director who is employed, or whose immediate family member is employed, as an executive officer of another company where any of the listed company’s present executives serve on that company’s compensation committee would not be independent until three years after the end of such service or the employment relationship (“NYSE Interlocking Directorate Provision”).⁴⁸

Fifth, a director who is an executive officer or an employee, or whose immediate family member is an executive officer, of a company that makes payments to, or receives payments from, the listed company for property or services in an amount which, in any single fiscal year, exceeds the greater of \$1 million, or 2% of such other company’s consolidated gross revenues, would not be independent until three years after falling below such threshold (“NYSE Business Relationship Provision”).⁴⁹ The NYSE proposes to clarify this proposal with respect to charitable organizations by adding a commentary noting that charitable organizations shall not be considered “companies” for purposes of

the NYSE Business Relationship Provision, provided that the listed company discloses in its annual proxy statement, or if the listed company does not file an annual proxy statement, in its annual report on Form 10-K filed with the Commission, any charitable contributions made by the listed company to any charitable organization in which a director serves as an executive officer if, within the preceding three years, such contributions in any single year exceeded the greater of \$1 million or 2% of the organization’s consolidated gross revenues.⁵⁰

The NYSE also proposes to clarify this proposal by adding commentary explaining that both the payments and the consolidated gross revenues to be measured shall be those reported in the last completed fiscal year, and that the look-back provision applies solely to the financial relationship between the listed company and the director or immediate family member’s current employer. A listed company would not need to consider former employment of the director or immediate family member.⁵¹

The NYSE proposes to define “immediate family member” to include a person’s spouse, parents, children, siblings, mothers- and fathers-in-law, sons- and daughters-in-law, brothers- and sisters-in-law, and anyone (other than domestic employees) who shares such person’s home.⁵² The NYSE also proposes that references to “company” include any parent or subsidiary in a consolidated group with the company.⁵³

The NYSE further proposes to revise the phase-in of the look-back requirement that the NYSE had previously proposed by applying a one-year look-back for the first year after adoption of these new standards.⁵⁴ The NYSE also proposes to change all of the look-back periods from five years to three years.⁵⁵ The three-year look-back would begin to apply from the date that

³⁹ See NYSE section 303A(1). See *infra* Section II.B.12. concerning Controlled Companies and other entities that would be exempt from this requirement.

⁴⁰ The NYSE proposes that for all provisions of NYSE section 303A that call for disclosure in a company’s Form 10-K, if a company subject to such a provision is not a company required to file a Form 10-K, then the provision shall be interpreted to mean the annual periodic disclosure form that the company files with the Commission. If a company is not required to file either an annual proxy statement or an annual periodic report with the Commission, the disclosure shall be made in the annual report required under NYSE section 203.01. See NYSE Amendment No. 2, *supra* note, and NYSE section 303A—General Application—References to Form 10-K.

⁴¹ See Commentary to NYSE section 303A(2)(a).

⁴² *Id.*

⁴³ See NYSE section 303A(2)(b)(i). In NYSE Amendment No. 2, *supra* note, the NYSE proposes the NYSE Employee Provision.

⁴⁴ See Commentary to NYSE section 303A(2)(b)(i).

⁴⁵ Permitted payments would include director and committee fees and pension or other forms of deferred compensation for prior service, provided such compensation is not contingent in any way on continued service. See NYSE section 303A(2)(b)(ii). In addition, compensation received by a director for former service as an interim Chairman or CEO would not be required to be considered. See Commentary to NYSE section 303A(2)(b)(ii). In NYSE Amendment No. 2, *supra* note, the NYSE proposes to add that compensation received by an immediate family member for service as a non-executive employee of the listed company would also not be required to be considered. In NYSE Amendment No. 2, *supra* note, the NYSE also proposes to revise various look-back provisions from five years to three years.

⁴⁶ See NYSE section 303A(2)(b)(ii). In NYSE Amendment No. 2, *supra* note, the NYSE proposes to revise the NYSE Direct Compensation Provision to be a bright-line test, rather than a rebuttable presumption.

⁴⁷ See NYSE section 303A(2)(b)(iii).

⁴⁸ See NYSE section 303A(2)(b)(iv).

⁴⁹ See NYSE section 303A(2)(b)(v).

⁵⁰ See NYSE Amendment No. 2, *supra* note 6, and Commentary to NYSE section 303A(2)(b)(v).

⁵¹ *Id.*

⁵² See General Commentary to NYSE section 303A(2)(b). In NYSE Amendment No. 2, *supra* note 6, the NYSE proposes to add that when applying the look-back provisions in NYSE section 303A(2)(b), listed companies need not consider individuals who are no longer immediate family members as a result of legal separation or divorce, or those who have died or become incapacitated.

⁵³ See NYSE Amendment No. 2, *supra* note 6, Commentary to NYSE section 303A(2)(a), and General Commentary to section 303A(2)(b).

⁵⁴ See NYSE Amendment No. 2, *supra* note 6, and General Commentary to NYSE section 303A(2)(b).

⁵⁵ See NYSE Amendment No. 2, *supra* note 6.

is the first anniversary of Commission approval of the proposed rule change.⁵⁶

3. Separate Meetings for Board Members

NYSE proposes to require the non-management directors of each NYSE-listed company to meet at regularly scheduled executive sessions without management.⁵⁷

In addition, NYSE proposes to require listed companies to disclose a method for interested parties to communicate directly with the presiding director of such executive sessions, or with the non-management directors as a group.⁵⁸ Companies may utilize the same procedures they have established to comply with Rule 10A-3(b)(3).⁵⁹

4. Nominating/Corporate Governance Committee

NYSE proposes to require each listed company to have a nominating/corporate governance committee composed entirely of independent directors.⁶⁰ The NYSE also proposes to require such committee to have a written charter that addresses, among other items, the committee's purpose and responsibilities, and an annual performance evaluation of the nominating/corporate governance committee ("NYSE Nominating/Corporate Governance Committee Provision").⁶¹ The NYSE further proposes to clarify that the committee would be required to identify individuals qualified to become board members, consistent with the criteria approved by the board.⁶²

5. Compensation Committee

NYSE proposes to require each listed company to have a compensation committee composed entirely of independent directors.⁶³ The NYSE also proposes to require the compensation committee to have a written charter that addresses, among other items, the committee's purpose and responsibilities, and an annual

performance evaluation of the compensation committee ("NYSE Compensation Committee Provision").⁶⁴ The Compensation Committee also would be required to produce a compensation committee report on executive compensation, as required by Commission rules to be included in the company's annual proxy statement or annual report on Form 10-K filed with the Commission.⁶⁵ Further, the NYSE proposes to (1) delete the previously proposed statement that the compensation committee has the sole authority to determine the compensation of the chief executive officer ("CEO"),⁶⁶ and provide that either as a committee or together with the other independent directors (as directed by the board), the committee would determine and approve the CEO's compensation level based on the committee's evaluation of the CEO's performance;⁶⁷ and (2) add a provision to the commentary on this section indicating that discussion of CEO compensation with the board generally is not precluded.⁶⁸

6. Audit Committee

a. Composition

NYSE sections 303A(6) and 303A(7) would require each NYSE-listed company to have a minimum three-person audit committee composed entirely of directors that meet the independence standards of both NYSE section 303A(2) and Rule 10A-3.⁶⁹ The NYSE also proposes to delete the previously proposed commentary relating to NYSE section 303A(6) and replace it with the following: "The Exchange will apply the requirements of Rule 10A-3 in a manner consistent with the guidance provided by the Securities and Exchange Commission in SEC Release No. 34-47654 (April 1, 2003). Without limiting the generality of the foregoing, the Exchange will provide companies with the opportunity to cure defects provided in Rule 10A-3(a)(3)."⁷⁰

In addition, the Commentary to NYSE section 303A(7)(a) would require that each member of the audit committee be financially literate, as such qualification is interpreted by the board in its business judgment, or must become financially literate within a reasonable period of time after his or her appointment to the audit committee.⁷¹ In addition, at least one member of the audit committee would be required to have accounting or related financial management expertise, as the company's board interprets such qualification in its business judgment.⁷² The NYSE also proposes to clarify that while the Exchange does not require that a listed company's audit committee include a person who satisfies the definition of audit committee financial expert set forth in Item 401(e) of Regulation S-K, a board may presume that such a person has accounting or related financial management experience.⁷³

If an audit committee member simultaneously serves on the audit committee of more than three public companies, and the listed company does not limit the number of audit committees on which its audit committee members serve, each board would be required to determine that such simultaneous service would not impair the ability of such member to effectively serve on the listed company's audit committee and to disclose such determination.⁷⁴

b. Audit Committee Charter and Responsibilities

NYSE section 303A(7)(c) would require the audit committee of each listed company to have a written audit committee charter that addresses: (i) The committee's purpose; (ii) an annual performance evaluation of the audit committee; and (iii) the duties and responsibilities of the audit committee ("NYSE Audit Committee Charter Provision").

The NYSE Audit Committee Charter Provision provides details as to the duties and responsibilities of the audit committee that must be addressed. These include, at a minimum, those set out in Rule 10A-3(b)(2), (3), (4) and (5),⁷⁵ as well as the responsibility to

⁵⁶ See NYSE Amendment No. 2, *supra* note 6, and General Commentary to NYSE section 303A(2)(b).

⁵⁷ See NYSE section 303A(3).

⁵⁸ See Commentary to NYSE section 303A(3). In NYSE Amendment No. 2, *supra* note 1, the NYSE proposes to delete the previously proposed requirement that interested parties be able to communicate confidentially, in addition to directly, with such parties.

⁵⁹ See Commentary to NYSE section 303A(3).

⁶⁰ See NYSE section 303A(4)(a). See *infra* Section II.B.12. concerning Controlled Companies and other entities that would be exempt from this requirement.

⁶¹ See NYSE section 303A(4)(b).

⁶² See NYSE Amendment No. 2, *supra* note 6, and NYSE section 303A(4)(b).

⁶³ See *infra* Sections II.B.12. concerning Controlled Companies and other entities that would be exempt from this requirement.

⁶⁴ See NYSE section 303A(5)(a).

⁶⁵ See NYSE Amendment No. 2, *supra* note 6, and NYSE section 303A(5)(b)(i)(C).

⁶⁶ See NYSE Amendment No. 2, *supra* note 6, and NYSE section 303A(5)(a).

⁶⁷ *Id.*

⁶⁸ See NYSE Amendment No. 2, *supra* note 6, and Commentary to NYSE section 303A(5).

⁶⁹ See NYSE sections 303A(6) and 303A(7). The Commission notes that new Rule 303A would incorporate various provisions of existing NYSE rules on corporate governance for listed companies, including, for example, requirements that an audit committee have a written charter and that such committee be comprised of at least three independent directors who meet certain financial literacy requirements.

⁷⁰ See NYSE Amendment No. 2, *supra* note 6, and Commentary to NYSE section 303A(6).

⁷¹ See Commentary to NYSE section 303A(7)(a).

⁷² *Id.*

⁷³ See NYSE Amendment No. 2, *supra* note 6, and Commentary to NYSE section 303A(7)(a).

⁷⁴ *Id.*

⁷⁵ See NYSE section 303A(7)(c). In NYSE Amendment No. 2, *supra* note, the NYSE proposes to cross-reference the sections of Rule 10A-3 that set forth the required duties and responsibilities of the audit committee, instead of detailing these requirements in NYSE Rule 303A as it had previously proposed.

annually obtain and review a report by the independent auditor; discuss the company's annual audited financial statement and quarterly financial statements with management and the independent auditor; discuss the company's earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies; discuss policies with respect to risk assessment and risk management; meet separately, periodically, with management, with internal auditors (or other personnel responsible for the internal audit function), and with independent auditors; review with the independent auditors any audit problems or difficulties and management's response; set clear hiring policies for employees or former employees of the independent auditors; and report regularly to the board.⁷⁶

7. Internal Audit Function

NYSE section 303A(7)(d) would require each listed company to have an internal audit function.⁷⁷

8. Corporate Governance Guidelines

NYSE section 303A(9) would require each listed company to adopt and disclose corporate governance guidelines. The following topics would be required to be addressed: director qualification standards; director responsibilities; director access to management and, as necessary and appropriate, independent advisors; director compensation; director orientation and continuing education; management succession; and annual performance evaluation of the board.⁷⁸ Each company's website would be required to include its corporate governance guidelines and the charters of its most important committees, and the availability of this information on the Web site or in print to shareholders would need to be referenced in the company's annual report on Form 10-K filed with the Commission.⁷⁹

9. Code of Business Conduct and Ethics

NYSE section 303A(10) would require each listed company to adopt and disclose a code of business conduct and ethics for directors, officers and employees, and to promptly disclose any waivers of the code for directors or executive officers.⁸⁰ The commentary to this section sets forth the most important topics that should be

addressed, including conflicts of interest; corporate opportunities; confidentiality of information; fair dealing; protection and proper use of company assets; compliance with laws, rules and regulations (including insider trading laws); and encouraging the reporting of any illegal or unethical behavior. Each code would be required to contain compliance standards and procedures to facilitate the effective operation of the code. Each listed company's Web site would be required to include its code of business conduct and ethics, and the availability of the code on the website or in print to shareholders would need to be referenced in the company's annual report on Form 10-K filed with the Commission.⁸¹

10. CEO Certification

NYSE section 303A(12)(a) would require the CEO of each listed company to certify to the NYSE each year that he or she is not aware of any violation by the company of the NYSE's corporate governance listing standards. This certification would be required to be disclosed in the company's annual report or, if the company does not prepare an annual report to shareholders, in the company's annual report on Form 10-K filed with the Commission.⁸²

In addition, NYSE section 303A(12)(b) would require the CEO of each listed company to promptly notify the NYSE in writing after any executive officer of the listed company becomes aware of any material non-compliance with any applicable provisions of the new requirements.⁸³

11. Public Reprimand Letter

NYSE section 303A(13) would allow the NYSE to issue a public reprimand letter to any listed company that violates an NYSE listing standard.⁸⁴

12. Exceptions to the NYSE Corporate Governance Proposals

The NYSE proposes to exempt any listed company of which more than 50% of the voting power is held by an individual, a group or another company ("Controlled Company") from the requirements that its board have a

majority of independent directors, and that the company have nominating/corporate governance and compensation committees composed entirely of independent directors. A company that chose to take advantage of any or all of these exemptions would be required to disclose that choice, that it is a Controlled Company, and the basis for the determination in its annual proxy statement or, if the company does not file an annual proxy statement, in the company's annual report on Form 10-K filed with the Commission.⁸⁵ Limited partnerships and companies in bankruptcy proceedings also would be exempt from requirements that the board have a majority of independent directors and that the issuer have nominating/corporate governance and compensation committees composed entirely of independent directors.⁸⁶

The NYSE considers the requirements of section 303A to be unnecessary for closed-end and open-end management investment companies that are registered under the Investment Company Act of 1940 ("Investment Company Act")⁸⁷, given the pervasive federal regulation applicable to them. However, the NYSE proposes that registered closed-end management investment companies ("closed-end funds") would be required to: (1) Have a minimum three-member audit committee that satisfies the requirements of Rule 10A-3; (2) comply with the requirements of the NYSE Audit Committee Charter Provision; and (3) comply with the certification and notification provisions regarding non-compliance.⁸⁸ Closed-end funds also would be excluded from the disclosure requirement relating to an audit committee member's simultaneous service on more than three audit committees, but would be subject to the requirement for the board to determine that such simultaneous service would not impair the ability of such member to effectively serve on the listed company's audit committee.⁸⁹

The NYSE also proposes to require business development companies, which are a type of closed-end management investment company defined in section 2(a)(48) of the

⁸¹ See Commentary to NYSE section 303A(10).

⁸² See NYSE section 303A(12)(a).

⁸³ See NYSE section 303A(12)(b). In NYSE Amendment No. 2, *supra* note, the NYSE proposes to clarify that the notification would be required to be in writing.

⁸⁴ See NYSE section 303A(13). In NYSE Amendment No. 2, *supra* note, the NYSE proposes to clarify that this lesser sanction was not intended for use in the case of companies that fail to comply with the requirements of Rule 10A-3. See Commentary to NYSE section 303A(13).

⁸⁵ See NYSE section 303A—General Application—Equity Listings—Controlled Companies.

⁸⁶ *Id.*

⁸⁷ 15 U.S.C. 80a-1 *et seq.*

⁸⁸ See NYSE section 303A—General Application—Equity Listings—Closed-End and Open End Funds.

⁸⁹ *Id.* See also NYSE Amendment No. 2, *supra* note.

⁷⁶ See NYSE section 303A(7)(c)(iii).

⁷⁷ See NYSE section 303A(7)(d).

⁷⁸ See Commentary to NYSE section 303A(9).

⁷⁹ *Id.*

⁸⁰ See NYSE section 303A(10).

Investment Company Act⁹⁰ that are not registered under the Investment Company Act, to comply with all of the provisions of NYSE section 303A applicable to domestic issuers, except that the directors of such companies, including audit committee members, would not be required to satisfy the independence requirements set forth in NYSE section 303A(2) and 303A(7)(b).⁹¹ For purposes of NYSE sections 303A(1), (3), (4), (5), and (9), a director of a business development company would be considered to be independent if he or she is not an "interested person" of the company, as defined in section 2(a)(19) of the Investment Company Act.⁹²

Open-end management investment companies ("open-end funds"), which can be listed as Investment Company Units, and are more commonly known as Exchange Traded Funds or ETFs, would be required to: (1) Have an audit committee that satisfies the requirements of Rule 10A-3, and (2) notify the Exchange in writing of any material non-compliance.⁹³

In addition, the NYSE proposes also to require the audit committees of closed-end and open-end funds to establish procedures for the confidential, anonymous submission by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company, of concerns regarding questionable accounting or auditing matters.⁹⁴ This responsibility would be required to be addressed in the audit committee charter.⁹⁵

NYSE proposes that except as otherwise required by Rule 10A-3, the new requirements also would not apply to passive business organizations in the form of trusts (such as royalty trusts) or to derivatives and special purpose securities (such as those described in NYSE sections 703.16, 703.19, 703.20, and 703.21). To the extent that Rule 10A-3 applies to a passive business organization, listed derivative, or special purpose security, the requirement to have an audit committee that satisfies the requirements of Rule 10A-3, and the requirement to notify

the NYSE in writing of any material non-compliance, also would apply.⁹⁶

The new requirements generally would not apply to companies listing only preferred or debt securities on the NYSE. To the extent required by Rule 10A-3, however, all companies listing only preferred or debt securities on the NYSE would be required to: (1) Have an audit committee that satisfies the requirements of Rule 10A-3, and (2) notify the Exchange in writing of any material non-compliance.⁹⁷

13. Application to Foreign Private Issuers

NYSE section 303A would permit NYSE-listed companies that are foreign private issuers, as such term is defined in Rule 3b-4 under the Exchange Act,⁹⁸ to follow home country practice in lieu of the new requirements, except that such companies would be required to: (1) Have an audit committee that satisfies the requirements of Rule 10A-3; (2) notify the NYSE in writing after any executive officer becomes aware of any non-compliance with any applicable provision; and (3) provide a brief, general summary of the significant ways in which its governance differs from those followed by domestic companies under NYSE listing standards.⁹⁹ Listed foreign private issuers would be permitted to provide this disclosure either on their website (provided it is in the English language and accessible from the United States) and/or in their annual report as distributed to shareholders in the United States in accordance with Sections 103.00 and 203.01 of the NYSE Manual.¹⁰⁰ If the disclosure is made available only on the website, the annual report would be required to state this and provide the web address at which the information may be obtained.¹⁰¹

⁹⁶ See NYSE section 303A—General Application—Other Entities. In NYSE Amendment No. 2, *supra* note, the NYSE proposes to add language to clarify the application of Rule 10A-3 to passive business organizations.

⁹⁷ See NYSE section 303A—General Application—Preferred and Debt Listings. In NYSE Amendment No. 2, *supra* note, the NYSE proposes to add language to clarify the application of Rule 10A-3 to companies listing only preferred or debt securities.

⁹⁸ 17 CFR 240.3b-4.

⁹⁹ See NYSE section 303A—General Application—Equity Listings—Foreign Private Issuers, and NYSE section 303A(11). In NYSE Amendment No. 2, *supra* note, the NYSE proposes to clarify the application of Rule 10A-3 to foreign private issuers.

¹⁰⁰ See Commentary to NYSE section 303A(11).

¹⁰¹ *Id.*

14. Proposed Implementation of New Requirements

In NYSE Amendment No. 2, the NYSE proposes a revised implementation schedule for the new requirements. Pursuant to the new schedule, listed companies would have until the earlier of their first annual meeting after January 15, 2004, or October 31, 2004, to comply with the new standards. However, if a company with a classified board is required to change a director who would not normally stand for election in such annual meeting, the company would be permitted to continue such director in office until the second annual meeting after such date, but no later than December 31, 2005. Notwithstanding the foregoing, foreign private issuers would have until July 31, 2005, to comply with any Rule 10A-3 audit committee requirements.¹⁰²

Companies listing in conjunction with their initial public offering¹⁰³ would be required to have one independent member at the time of listing, a majority of independent members within 90 days of listing, and fully independent committees within one year. They would be required to meet the majority of independent board requirement within 12 months of listing.¹⁰⁴

Companies listing upon transfer from another market would have 12 months from the date of transfer in which to comply with any requirement to the extent the market on which they were listed did not have the same requirement. To the extent the other market has a substantially similar requirement but also had a transition period from the effective date of that

¹⁰² See NYSE Amendment No. 2, *supra* note, and NYSE section 303A—General Application—Effective Dates/Transition Period.

¹⁰³ In NYSE Amendment No. 2, *supra* note, NYSE proposes that for purposes of section 303A, a company would be considered to be listing in conjunction with an initial public offering if, immediately prior to listing, it does not have a class of common stock registered under the Exchange Act. The NYSE also proposes to permit companies that are emerging from bankruptcy or have ceased to be Controlled Companies within the meaning of section 303A to phase in independent nomination and compensation committees and majority independent boards on the same schedule as companies listing in conjunction with an initial public offering. However, for purposes of the requirement that a company have an audit committee that complies with the requirements of Rule 10A-3, and the requirement that a company notify the Exchange in writing of any material non-compliance, a company will be considered to be listing in conjunction with an initial public offering only if it meets the conditions of Rule 10A-3(b)(1)(iv)(A). Investment companies are not subject to this exemption under Rule 10A-3(b)(1)(iv)(A), however. See NYSE section 303A—General Application—Effective Dates/Transition Period.

¹⁰⁴ See NYSE Amendment No. 2, *supra* note, and NYSE section 303A—General Application—Effective Dates/Transition Period.

⁹⁰ 15 U.S.C. 80a-2(a)(48).

⁹¹ See NYSE Amendment No. 2, *supra* note and NYSE section 303A—General Application—Equity Listings—Closed-End and Open-End Funds.

⁹² 15 U.S.C. 80a-2(a)(19).

⁹³ See NYSE Amendment No. 2, *supra* note, and NYSE section 303A—General Application—Closed-End and Open-End Funds.

⁹⁴ See NYSE Amendment No. 2, *supra* note, and NYSE section 303A—General Application—Equity Listings—Closed-End and Open-End Funds.

⁹⁵ See NYSE Amendment No. 3.

market's rule, which period had not yet expired, the company would have the same transition period as would have been available to it on the other market. This transition period for companies transferring from another market would not apply to the audit committee requirements of Rule 10A-3 unless a transition period is available under Rule 10A-3.¹⁰⁵

C. Nasdaq Proposals

According to Nasdaq, the purpose of the Nasdaq Independent Director Proposal is to provide greater transparency regarding certain relationships that would preclude a board of directors from finding that an individual can serve as an independent director, and to increase the role of independent directors on board committees.¹⁰⁶ In Nasdaq's view, the proposal is intended to enhance investor confidence in the companies that list on Nasdaq.¹⁰⁷ According to Nasdaq, the purpose of the Nasdaq Going Concern Proposal is to bring notice of a going concern qualification to investors and potential investors;¹⁰⁸ the purpose of the Nasdaq Related Party Transactions Proposal is to improve investor protection;¹⁰⁹ the purpose of the Nasdaq Issuer Applicability Proposal is to alert investors to the exemptions that may be granted to foreign issuers;¹¹⁰ and the purpose of the Nasdaq Code of Conduct Proposal is to provide further assurance to investors, regulators, and Nasdaq that each of Nasdaq's issuers has in place a system to focus attention throughout the company on the obligation of ethical conduct, encourage reporting of potential violations, and deal fairly and promptly with questionable behavior.¹¹¹

1. Independence of Majority of Board Members

Nasdaq proposes to amend Nasdaq Rule 4200, which sets forth definitions, and Nasdaq Rule 4350, which governs qualitative listing requirements for Nasdaq National Market and Nasdaq SmallCap Market issuers (other than limited partnerships). Under the amendment to NASD Rule 4350(c)(1), a majority of the directors on the board of a Nasdaq-listed company would be required to be independent directors, as defined in NASD Rule 4200. Nasdaq proposes to require each listed company

to disclose in its annual proxy (or, if the issuer does not file a proxy, in its Form 10-K or 20-F) those directors that the board has determined to be independent under NASD Rule 4200.¹¹²

If an issuer fails to comply with this requirement due to one vacancy, or one director ceases to be independent due to circumstances beyond their reasonable control, Nasdaq proposes to require the issuer to regain compliance with the requirement by the earlier of its next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement.¹¹³ Nasdaq proposes to require any issuer relying on this provision to provide notice to Nasdaq immediately upon learning of the event or circumstance that caused the non-compliance.¹¹⁴

Pursuant to current NASD Rule 4200(a)(15), a director would not be independent if the director is an officer or employee of the company or its subsidiaries, or any other individual having a relationship which, in the opinion of the company's board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.¹¹⁵

The NASD proposes to revise NASD Rule 4200(a)(15)(A) through (E) and add subparagraphs (F) and (G). NASD Rule 4200(a)(15) provides a list of relationships that would preclude a board finding of independence. First, a director who is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company, would not be deemed independent ("Nasdaq Employee Provision").¹¹⁶

Second, a director who accepts or has a Family Member¹¹⁷ who accepts any payments from the company, or any parent or subsidiary of the company, in excess of \$60,000 during the current fiscal year or any of the past three fiscal years, other than certain permitted payments,¹¹⁸ would not be deemed

independent ("Nasdaq Payments Provision").¹¹⁹

Nasdaq proposes to state in the interpretive material to its rules ("Interpretive Material") that the Nasdaq Payments Provision is generally intended to capture situations where a payment is made directly to, or for the benefit of, the director or a family member of the director.¹²⁰ For example, consulting or personal service contracts with a director or family member of the director or political contributions to the campaign of a director or a family member of the director would be considered under the Nasdaq Payments Provision.¹²¹

Third, a director who is a Family Member of an individual who is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company as an executive officer, would not be deemed independent ("Nasdaq Family of Executive Officer Provision").¹²²

Fourth, a director who is, or has a Family Member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the company made, or from which the company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or \$200,000, whichever is more, other than certain permitted payments,¹²³ would not be deemed independent ("Nasdaq Business Relationship Provision").¹²⁴ In

plan, or non-discretionary compensation; and loans permitted under section 13(k) of the Exchange Act. 78 U.S.C. 78m(k). See NASD Rule 4200(a)(15)(B). In Amendment No. 3 to the Independent Director Proposal, *supra* note, Nasdaq proposes to add compensation for board committee service and loans permitted under section 13(k) of the Exchange Act to permitted payments. See *also infra* note 122.

¹¹⁹ See NASD Rule 4200(a)(15)(B).

¹²⁰ See Amendment No. 3 to the Independent Director Proposal, *supra* note 12.

¹²¹ See NASD IM-4200—Definition of Independence—Rule 4200(a)(15).

¹²² See NASD Rule 4200(a)(15)(C). In Amendment No. 3 to the Independent Director Proposal, *supra* note, Nasdaq proposes a conforming change in subparagraph (B) of NASD Rule 4200 to indicate that employment compensation to a Family Member of an Independent Director as permitted in that subparagraph applies only when the Family Member is not an executive of the company.

¹²³ Permitted payments would include payments arising solely from investments in the company's securities, and payments under non-discretionary charitable contribution matching programs. See NASD Rule 4200(a)(15)(D). In Amendment No. 3 to the Independent Director Proposal, *supra* note, Nasdaq proposes to include payments under non-discretionary charitable contribution matching programs as permitted payments.

¹²⁴ See NASD Rule 4200(a)(15)(D). In Amendment No. 3 to the Independent Director Proposal, *supra* note, Nasdaq proposes to expand this proposal to

Continued

¹⁰⁵ *Id.*

¹⁰⁶ See Nasdaq Independent Director Proposal.

¹⁰⁷ *Id.*

¹⁰⁸ See Nasdaq Going Concern Proposal.

¹⁰⁹ See Nasdaq Related Party Transactions Proposal.

¹¹⁰ See Nasdaq Issuer Applicability Proposal.

¹¹¹ See Nasdaq Code of Conduct Proposal.

¹¹² See Amendment No. 3 to the Nasdaq Independent Director Proposal, *supra* note, and NASD Rule 4350(c)(1).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See NASD Rule 4200(a)(15).

¹¹⁶ See NASD Rule 4200(a)(15)(A).

¹¹⁷ In Amendment No. 3 to the Independent Director Proposal, *supra* note, Nasdaq proposes to define "Family Member" as "a person's spouse, parents, children and siblings, whether by blood, marriage or adoption, or anyone residing in such person's home." See NASD Rule 4200(a)(14).

¹¹⁸ Permitted payments would include compensation for board or board committee service; payments arising solely from investments in the company's securities; compensation paid to a Family Member who is a non-executive employee of the company or a parent or subsidiary of the company; benefits under a tax-qualified retirement

Amendment No. 3 to the Nasdaq Independent Director Proposal, Nasdaq proposes to add Interpretive Material clarifying the application of the Nasdaq Business Relationship Provision. The Interpretive Material states that this proposal is generally intended to capture payments to an entity with which the director or Family Member of the director is affiliated by serving as a partner (other than a limited partner), controlling shareholder or executive officer of such entity.¹²⁵ The Interpretive Material states that under exceptional circumstances, such as where a director has direct, significant business holdings, it may be appropriate to apply the corporate measurements in the Nasdaq Business Relationship Provision, rather than the individual measurements of the Nasdaq Payments Provision, and that issuers should contact Nasdaq if they wish to apply the rule in this manner.¹²⁶ The Interpretive Material further notes that the independence requirements of the Nasdaq Business Relationship Provision are broader than the rules for audit committee member independence set forth in Rule 10A-3(e)(8) under the Exchange Act.¹²⁷

Moreover, the Interpretive Material states that under the Nasdaq Business Relationship Provision, a director who is, or who has a Family Member who is, an executive officer of a charitable organization may not be considered independent if the company makes payments to the charity in excess of the greater of the greater of 5% of the charity's revenues or \$200,000.¹²⁸ The Interpretive Material also discusses the treatment of payments from the issuer to a law firm in determining whether a director who is a lawyer may be considered independent.¹²⁹ The Interpretive Material notes that any partner in a law firm that receives payments from the issuer is ineligible to serve on that issuer's audit committee.¹³⁰

Fifth, a director of the listed company who is, or has a Family Member who is, employed as an executive officer of another entity at any time during the past three years where any of the executive officers of the listed company

include Family Members, and to clarify that disqualifying payments are payments for "property or services."

¹²⁵ See Amendment No. 3 to the Independent Director Proposal, *supra* note, and NASD-IM—4200—Definition of Independence—Rule 4200(a)(15).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

serves on the compensation committee of such other entity, would not be deemed independent ("Nasdaq Interlocking Directorate Provision").¹³¹

Sixth, a director who is, or has a Family Member who is, a current partner of the company's outside auditor, or was a partner or employee of the company's outside auditor, and worked on the company's audit, at any time, during the past three years, would not be deemed independent ("Nasdaq Auditor Relationship Provision").¹³²

Seventh, Nasdaq proposes that, in the case of an investment company, a director would not be considered independent if the director is an "interested person" of the company as defined in section 2(a)(19) of the Investment Company Act, other than in his or her capacity as a member of the board of directors or any board committee.¹³³ This provision would be in lieu of the other tests for independence specified in the rule.

With respect to the look-back periods referenced in the Nasdaq Employee Provision, the Nasdaq Family of Executive Officer Provision, the Nasdaq Interlocking Directorate Provision, and the Nasdaq Auditor Relationship Provision, Nasdaq proposes to clarify that "any time" during any of the past three years should be considered,¹³⁴ and to add Interpretive Material stating that these three year look-back periods commence on the date the relationship ceases. As an example, the Interpretive Material states that a director employed by the company would not be independent until three years after such employment terminates.¹³⁵ Nasdaq also proposes to add Interpretive Material stating that the reference to a "parent or subsidiary" in the definition of independence is intended to cover entities the issuer controls and consolidates with the issuer's financial statements as filed with the Commission (but not if the issuer reflects such entity solely as an investment in its financial

¹³¹ See NASD Rule 4200(a)(15)(E). In Amendment No. 3 to the Independent Director Proposal, *supra* note, Nasdaq proposes to expand this proposal to include Family Members.

¹³² See NASD Rule 4200(a)(15)(F). In Amendment No. 3 to the Independent Director Proposal, *supra* note, Nasdaq proposes to expand this proposal to include a director who is, or has a Family Member who is, a current partner of the company's outside auditor, regardless of whether such partner worked on the company's audit.

¹³³ See NASD Rule 4200(a)(15)(G) and Amendment No. 3 to the Nasdaq Independent Director Proposal, *supra* note.

¹³⁴ See Amendment No. 3 to the Independent Director Proposal, *supra* note, and NASD Rules 4200(a)(15)(A), (C), (E), and (F).

¹³⁵ See Amendment No. 3 to the Independent Director Proposal, *supra* note and NASD IM—4200 "Definition of Independence" Rule 4200(a)(15).

statements). The Interpretive Material also adds that the reference to "executive officer" has the same meaning as the definition in Rule 16a-1(f) under the Exchange Act.¹³⁶

2. Separate Meetings for Board Members

Nasdaq proposes to require independent directors to have regularly scheduled meetings at which only independent directors would be present.¹³⁷

3. Compensation of Officers

Nasdaq proposes to require the compensation of the CEO of a listed company to be determined or recommended to the board for determination either by a majority of the independent directors, or by a compensation committee comprised solely of independent directors ("Nasdaq Compensation of Executives Provision").¹³⁸ In addition, the compensation of all other officers would have to be determined or recommended to the board for determination either by a majority of the independent directors, or a compensation committee comprised solely of independent directors.¹³⁹

Under the Nasdaq proposal, if the compensation committee was comprised of at least three members, one director, who is not independent (as defined in NASD Rule 4200) and is not a current officer or employee or a Family Member of such person, would be permitted to be appointed to the committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the next annual meeting proxy statement subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for the determination.¹⁴⁰ A member appointed under such exception would not be permitted to serve longer than two years.

¹³⁶ *Id.* 17 CFR 240.16a-1(f).

¹³⁷ See NASD Rule 4350(c)(2).

¹³⁸ See NASD Rule 4350(c)(3)(A). In Amendment No. 3 to the Independent Director Proposal, *supra* note 12, Nasdaq proposes to delete the requirement that the independent directors meet in executive session to determine CEO compensation, and add the requirement that the CEO may not be present during voting or deliberations.

¹³⁹ See NASD Rule 4350(c)(3)(B). In Amendment No. 3 to the Independent Director Proposal, *supra* note 12, Nasdaq proposes to add the option that the compensation of the CEO and other officers could be recommended to the board for its determination rather than determined by the committee.

¹⁴⁰ See NASD Rule 4350(c)(3)(C).

4. Nomination of Directors

Nasdaq proposes to amend NASD Rule 4350(c) to require director nominees to either be selected or recommended for the board's selection either by a majority of independent directors, or by a nominations committee comprised solely of independent directors ("Nasdaq Director Nomination Provision").¹⁴¹

If the nominations committee is comprised of at least three members, one director, who is not independent (as defined in NASD Rule 4200) and is not a current officer or employee or a Family Member of such person, would be permitted to be appointed to the committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the next annual meeting proxy statement subsequent to such determination (of, if the issuer does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for the determination.¹⁴² A member appointed under such exception would not be permitted to serve longer than two years.

Further, Nasdaq proposes to require each issuer to certify that it has adopted a formal written charter or board resolution, as applicable, addressing the nominations process and such related matters as may be required under the federal securities laws.¹⁴³ Nasdaq also proposes that the Nasdaq Director Nomination Provision would not apply in cases where either the right to nominate a director legally belongs to a third party,¹⁴⁴ or the company is subject to a binding obligation that requires a director nomination structure inconsistent with this provision and

such obligation pre-dates the date the provision is approved.¹⁴⁵

5. Controlled Companies Exempt

Nasdaq proposes generally to exempt any Controlled Company from the requirement to have a majority of independent directors and from the compensation and nomination committee requirements discussed above. However, the independent directors would still be required to have regularly scheduled meetings at which only independent directors are present.¹⁴⁶ A Controlled Company would be defined as a company of which more than 50% of the voting power is held by an individual, a group, or another company. A company relying upon the exemption would be required to disclose in its annual proxy statement (or, if the issuer does not file a proxy, in its Form 10-K or 20-F) that it is a Controlled Company and the basis for that determination. To determine whether a group exists for purposes of this exception, the shareholders must have publicly filed a notice that they are acting as a group (e.g., a Schedule 13D).¹⁴⁷

6. Audit Committee Charter and Responsibilities

NASD Rule 4350(d) would retain the requirement that each issuer adopt a formal written audit committee charter, and the proposed amendment to the rule would require the charter to specify the committee's purpose of overseeing the accounting and financial reporting processes and the audits of the financial statements of the issuer.¹⁴⁸ The written charter also would be required to include specific audit committee responsibilities and authority, as set forth in the proposed amendment to Rule 4350(d)(3).¹⁴⁹ Nasdaq also

proposes to state in Interpretive Material to Rule 4350(d) that the written charter set forth the scope of the audit committee's responsibilities and the means by which the committee carries out those responsibilities; the outside auditor's accountability to the committee; and the committee's responsibility to ensure the independence of the outside auditors.¹⁵⁰

7. Audit Committee Composition

NASD Rule 4350(d) would retain the requirement that each listed issuer have an audit committee composed of at least three members.¹⁵¹ However, under the proposed requirements, each audit committee member would be required to: (1) Be independent, as defined under NASD Rule 4200; (2) meet the criteria for independence set forth in Rule 10A-3 (subject to the exceptions provided in Rule 10A-3(c)); and (3) not have participated in the preparation of the financial statements of the company or any current subsidiary of the company at any time during the past three years, in addition to satisfying the current requirement that the member be able to read and understand fundamental financial statements, including a company's balance sheet, income statement, and cash flow statement ("Nasdaq Audit Committee Provision").¹⁵²

One director who is not independent as defined in NASD Rule 4200 and meets the criteria set forth in section 10A(m)(3) of the Exchange Act¹⁵³ and the rules thereunder, and is not a current officer or employee of the company or a Family Member of such person, may be appointed to the audit committee if the board, under exceptional and limited circumstances, determines that membership on the committee by the individual is required by the best interests of the company and

matters, (iii) authority to engage advisors, and (iv) funding as determined by the audit committee. In Amendment No. 3 to the Independent Director Proposal, *supra* note 12, Nasdaq proposes to clarify that audit committees for investment companies must also establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company.

¹⁵⁰ See IM-4350-4—Board Independence and Independent Committees—Audit Committees—Rule 4350(d)—Audit Committee Charter.

¹⁵¹ See NASD Rule 4350(d)(2). See also *supra* note.

¹⁵² See NASD Rule 4350(d)(2)(A)(i)–(iv). In Amendment No. 3 to the Independent Director Proposal, *supra* note 12, Nasdaq proposes to: (1) Add a cross-reference to Rule 10A-3; and (2) add the third requirement noted above.

¹⁵³ 15 U.S.C. 78j-1(m).

¹⁴¹ See NASD Rule 4350(c)(4)(A). In Amendment No. 3 to the Independent Director Proposal, *supra* note 12, Nasdaq proposes to add the option that director nominees could be recommended for the board's selection.

¹⁴² See NASD Rule 4350(c)(4)(C). In Amendment No. 3 to the Independent Director Proposal, *supra* note 12, Nasdaq proposes to delete another exception that it had previously proposed, which would have permitted an appointment to the nominating committee, under specified circumstances, of a non-independent director who owns 20% or more of a company's voting stock.

¹⁴³ See NASD Rule 4350(c)(4)(B) and Amendment No. 3 to the Independent Director Proposal.

¹⁴⁴ Nasdaq proposes to add a sentence to explain that this provision does not relieve a company's obligation to comply with the committee composition requirements under Rule 4350(c) and (d). See Amendment No. 3 to the Independent Director Proposal, *supra* note 12, and NASD Rule 4350(c)(4)(D).

¹⁴⁵ See Amendment No. 3 to the Independent Director Proposal, *supra* note 12 and NASD Rule 4350(c)(4)(E).

¹⁴⁶ See NASD Rule 4350(c)(5). In Amendment No. 3 to the Independent Director Proposal, *supra* note 12, Nasdaq proposes to clarify that the exemption does not apply to executive sessions of independent directors.

¹⁴⁷ See IM-4350-4—Controlled Company Exception.

¹⁴⁸ See NASD Rule 4350(d)(1). NASD Rule 4350(d) would retain various provisions of the current rule, including, for example, the requirements that an audit committee have a written charter and that it be comprised of at least three independent directors who meet certain financial literacy requirements.

¹⁴⁹ NASD Rule 4350(d)(3) would require the audit committee to have the specific audit committee responsibilities and authority necessary to comply with Rule 10A-3(b)(2), (3), (4) and (5) (subject to the exemptions provided in Rule 10A-3(c)), concerning responsibilities relating to: (i) Registered public accounting firms, (ii) complaints relating to accounting, internal accounting controls or auditing

its shareholders, and the board discloses, in the next annual proxy statement subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for that determination. A member appointed under this exception would not be permitted to serve longer than two years and would not be permitted to chair the audit committee.¹⁵⁴ Nasdaq proposes to add to Interpretive Material the recommendation that an issuer disclose in its annual proxy (or, if the issuer does not file a proxy, in its Form 10-K or 20-F) if any director is deemed independent but falls outside the safe harbor provisions of Rule 10A-3(e)(1)(ii).¹⁵⁵

In addition, Nasdaq will retain the requirement that at least one member of the audit committee have past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities.¹⁵⁶

Nasdaq proposes to delete from the Interpretive Material the discussion relating to determining whether a

person is an affiliate solely by virtue of stock ownership.¹⁵⁷

8. Cure Periods

Nasdaq proposes to add a cure period provision, as follows: (1) If a listed issuer fails to comply with the audit committee composition requirements under Rule 10A-3 and NASD Rule 4350(d)(2), because an audit committee member ceases to be independent for reasons outside the member's reasonable control, the audit committee member could remain on the committee until the earlier of the issuer's next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with the requirements; and (2) if an issuer fails to comply with the audit committee composition requirements due to one vacancy on the audit committee, and the aforementioned cure period is not otherwise being relied upon for another audit committee member, the issuer would have until the earlier of the next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement.¹⁵⁸ An issuer relying on either of these provisions would be required to provide notice to Nasdaq immediately upon learning of the event or circumstance that caused the non-compliance.

9. Notification of Noncompliance

Nasdaq proposes to require that an issuer provide Nasdaq with prompt notification after an executive officer of the issuer becomes aware of any material noncompliance by the issuer with the requirements of NASD Rule 4350.¹⁵⁹

10. Code of Business Conduct and Ethics

In the Nasdaq Code of Conduct Proposal, as amended,¹⁶⁰ Nasdaq proposes NASD Rule 4350(n) and related Interpretive Material, which would require each listed company to adopt a code of conduct applicable to all directors, officers and employees, and to make such code publicly available. The code of conduct would be required to comply with the definition of a "code of ethics" set forth in Section 406(c) of the Sarbanes-Oxley Act and any regulations thereunder. In addition, the code must provide for an enforcement mechanism

that ensures prompt and consistent enforcement of the code, protection for persons reporting questionable behavior, clear and objective standards for compliance, and a fair process by which to determine violations.

Moreover, any waivers of the code for directors or executive officers must be approved by the board and disclosed in a Form 8-K within five days.

In the Interpretive Material, Nasdaq proposes that the requirement of a publicly available code of conduct applicable to all directors, officer and employees of an issuer is intended to demonstrate to investors that the board and management of Nasdaq issuers have carefully considered the requirement of ethical dealing and have put in place a system to ensure that they become aware of and take prompt action against any questionable behavior. Nasdaq states that, for company personnel, a code of conduct with enforcement provisions provides assurance that reporting of questionable behavior is protected and encouraged, and fosters an atmosphere of self-awareness and prudent conduct.

11. Public Announcement of Audit Opinions With Going Concern Qualifications

In the Nasdaq Going Concern Proposal,¹⁶¹ Nasdaq proposes to amend NASD Rule 4350(b) to require each Nasdaq-listed company that receives an audit opinion that contains a going concern qualification to make a public announcement through the news media disclosing the receipt of such qualification. Under the proposal, the issuer, prior to the release of the public announcement, would be required to provide the text of the public announcement to the StockWatch section of Nasdaq's MarketWatch Department. The public announcement must be provided to Nasdaq StockWatch and released to the media not later than seven calendar days following the filing of the audit opinion in a public filing with the Commission.¹⁶²

12. Related Party Transactions

In the Nasdaq Related Party Transactions Proposal, as amended,¹⁶³ Nasdaq proposes to amend NASD Rule 4350(h) to specify that each issuer shall conduct an appropriate review of all related party transactions for potential conflict of interest situations on an ongoing basis and all such transactions would have to be approved by the listed

¹⁵⁴ See NASD Rule 4350(d)(2)(B). In Amendment No. 3 to the Independent Director Proposal, *supra* note 12, Nasdaq proposes to delete a previously proposed provision that would have permitted membership on the audit committee, under certain circumstances, of a director who owns or controls a specified percentage of the issuer's voting securities.

¹⁵⁵ See Amendment No. 3 to the Independent Director Proposal, *supra* note 12. Among other criteria, section 10A(m) of the Exchange Act and Rule 10A-3 thereunder provide that a member of an audit committee of an issuer is not considered "independent" if the member is an "affiliated person" of the issuer or a subsidiary. An "affiliated person" includes, among other things, a person who "controls" the issuer. The safe harbor of Rule 10A-3(e)(1)(ii) provides that a person who is not an executive officer of the issuer and is not the beneficial owner, directly or indirectly, of 10% or more of any class of voting equity securities of the issuer is deemed not to control the issuer for purposes of determining affiliation. However, a person who exceeds the 10% beneficial ownership is not presumptively deemed to control the issuer, and thus could still be deemed independent under the particular facts and circumstances. See Rule 10A-3(e)(1)(ii)(B).

¹⁵⁶ See NASD Rule 4350(d)(2)(A). In Amendment No. 3 to the Independent Director Proposal, *supra* note 12, Nasdaq proposes to clarify in Interpretive Material that a director who qualifies as an audit committee financial expert under Item 401(h) of Regulation S-K or Item 401(e) of Regulation S-B is presumed to qualify as a financially sophisticated audit committee member.

¹⁵⁷ See Amendment No. 3 to the Independent Director Proposal, *supra* note 12.

¹⁵⁸ See NASD Rule 4350(d)(4)(A) and (B).

¹⁵⁹ See NASD Rule 4350(m), which was added by Amendment No. 3 to the Independent Director Proposal, *supra* note 12.

¹⁶⁰ See the Nasdaq Code of Conduct Proposal, as amended, *supra* notes 25 and 28.

¹⁶¹ See the Nasdaq Going Concern Proposal.

¹⁶² See NASD Rule 4350(b)(1)(B).

¹⁶³ See the Nasdaq Related Party Transactions Proposal, as amended, *supra* notes 16, 18, and 19.

company's audit committee or another independent body of the board of directors. For purposes of the rule, "related party transactions" would refer to transactions required to be disclosed pursuant to Commission Regulation S-K, Item 404.¹⁶⁴ Nasdaq proposes that the Related Party Transactions Proposal become operative on January 15, 2004.¹⁶⁵

13. Application to Foreign Issuers and Certain Other Issuers

NASD Rule 4350 currently provides that foreign issuers are not required to do any act that is contrary to a law, rule or regulation of any public authority exercising jurisdiction over such issuer or that is contrary to generally accepted business practices in the issuer's country of domicile. Currently, Nasdaq may provide exemptions from the requirements of NASD Rule 4350 as may be necessary or appropriate to carry out this intent. In the Nasdaq Issuer Applicability Proposal, as amended,¹⁶⁶ Nasdaq proposes to amend this rule and add Interpretive Material to clarify that the authority to grant exemptions from the corporate governance standards applies only to foreign private issuers and does not apply to the extent that such exemption would be contrary to the federal securities laws, including, without limitation, section 10A(m) of the Exchange Act and Rule 10A-3 thereunder. Nasdaq also proposes to provide that a foreign issuer that receives an exemption from NASD Rule 4350 would be required to disclose in its annual reports filed with the Commission each requirement from which it is exempted and describe the home country practice, if any, followed by the issuer in lieu of these requirements. In addition, a foreign issuer making its initial public offering or first U.S. listing on Nasdaq would be required to disclose any such exemptions in their registration statement.

In addition, Nasdaq proposes that management investment companies (including business development companies) would be subject to all of the requirements of NASD Rule 4350, except that management investment companies registered under the Investment Company Act would be exempt from the requirements of NASD Rule 4350(c) and (n), which pertain to board and key committee independence requirements and codes of conduct.¹⁶⁷

Nasdaq proposed these exemptions in light of the fact that registered management investment companies are already subject to a pervasive system of federal regulation.

Finally, Nasdaq proposes that cooperative entities, such as agricultural cooperatives that are structured to comply with relevant state law and federal tax law and that do not have a publicly traded class of common stock would be exempt from NASD Rule 4350(c); however, such entities would be required to comply with all federal securities laws, including, without limitation, section 10A(m) of the Exchange Act and Rule 10A-3 thereunder.¹⁶⁸

Nasdaq proposes that asset-backed issuers and other passive issuers,¹⁶⁹ such as unit investment trusts, would be exempt from NASD Rule 4350(c) and (n), which pertain to board and key committee independence requirements and codes of conduct, and the audit committee requirements of NASD Rule 4350(d).¹⁷⁰ Nasdaq noted that these revisions are commensurate with provisions contained in Rule 10A-3.

14. Proposed Implementation of New Requirements

In Amendment No. 3 to the Nasdaq Issuer Applicability Proposal,¹⁷¹ Nasdaq proposed to set out in NASD Rule 4350(a)(5) the proposed dates by which listed companies would be required to comply with the rule changes to NASD Rules 4200 and 4350 that are the subject of this Order. In order to allow companies to make necessary adjustments in the course of their regular annual meeting schedule, and consistent with Exchange Act Rule 10A-3, the rule would establish the deadlines for compliance listed below. During the transition period between the date of approval of the rule filing by the Commission and the deadline indicated for each rule change, companies that have not brought themselves into compliance with the new rules would be required to comply with the previously existing rules, as applicable.¹⁷²

¹⁶⁸ *Id.*

¹⁶⁹ These are issuers that are organized as trusts or other unincorporated associations that do not have a board of directors or persons acting in a similar capacity and whose activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the listed securities.

¹⁷⁰ See Amendment Nos. 2 and 3 to the Nasdaq Issuer Applicability Proposal.

¹⁷¹ See *supra* note 24.

¹⁷² To make the application of the rules easier to understand, Nasdaq also proposed in Amendment

Companies would be required to be in compliance with the new rules by the following dates:

The provisions of Rule 4200(a) and Rule 4350(c), (d) and (m) regarding director independence, independent committees, and notification of noncompliance would be required to be implemented by:

- July 31, 2005 for foreign private issuers¹⁷³ and small business issuers (as defined in Rule 12b-2¹⁷⁴); and
- For all other listed issuers, by the earlier of: (1) The listed issuer's first annual shareholders meeting after January 15, 2004; or (2) October 31, 2004.

In the case of an issuer with a staggered board, with the exception of the audit committee requirements, the issuer would have until its second annual meeting after January 15, 2004, but not later than December 31, 2005, to implement all new requirements relating to board composition, if the issuer would be required to change a director who would not normally stand for election at an earlier annual meeting. Such issuers would be required to comply with the audit committee requirements pursuant to the implementation schedule noted above.

Issuers that have listed or will be listed in conjunction with their initial public offering would be afforded exemptions from all board composition requirements consistent with the exemptions afforded in Rule 10A-3(b)(1)(iv)(A). That is, for each committee that the company adopts, the company would be required to have one independent member at the time of listing, a majority of independent members within 90 days of listing, and all independent members within one year. The rule would note, however, that investment companies are not afforded the exemptions in Rule 10A-3(b)(1)(iv)(A). Issuers could choose not to adopt a compensation or nomination committee and could instead rely upon a majority of the independent directors to discharge responsibilities under the rules. These issuers would be required to meet the majority independent board requirement within one year of listing.

Companies transferring from other markets with a substantially similar requirement would be afforded the

No. 3 to the Nasdaq Issuer Applicability Proposal to adopt Rules 4200A and 4350A, which would set forth the sections of existing Rules 4200 and 4350 that will continue to be applicable until the deadlines for compliance with the proposed changes.

¹⁷³ See Section II.C.13., *supra* for a discussion of the treatment of foreign private issuers under the Nasdaq proposals.

¹⁷⁴ 17 CFR 240.12b-2.

¹⁶⁴ See NASD Rule 4350(h).

¹⁶⁵ See Amendment No. 3 to the Nasdaq Related Party Transactions Proposal, *supra* note 19.

¹⁶⁶ See *supra* notes 22 to 24.

¹⁶⁷ *Id.*

balance of any grace period afforded by the other market. Companies transferring from other listed markets that do not have a substantially similar requirement would be afforded one year from the date of listing on Nasdaq. The rule would stipulate that this transition period is not intended to supplant any applicable requirements of Rule 10A-3 under the Exchange Act.

Compliance with the limitations on corporate governance exemptions to foreign private issuers would be required by July 31, 2005. However, the requirement that a foreign issuer disclose the receipt of a corporate governance exemption from Nasdaq would apply to new listings and filings made after January 1, 2004.

Compliance with proposed Rule 4350(n), requiring issuers to adopt a code of conduct,¹⁷⁵ would be required six months after approval by the Commission. Proposed Rule 4350(h), requiring audit committee approval of related party transactions, would be operative January 15, 2004. The remainder of Proposed Rules 4350(a) and 4350(b) would be effective upon approval by the Commission.

III. Summary of Comments on NYSE and Nasdaq Proposals

The Commission received a total of 90 comment letters on the NYSE and Nasdaq proposals.¹⁷⁶ Many of the commenters expressed their support for the goals of the proposals.¹⁷⁷ While some commenters praised specific

provisions of the proposals,¹⁷⁸ other commenters argued that specific provisions of the proposals were too restrictive or too lenient.¹⁷⁹ Many commenters believed that certain aspects of the proposals needed clarification.¹⁸⁰ The commenters generally addressed issues falling into one or more of the categories discussed below.

A. Independence of Majority of Board Members

General

Many commenters supported the proposals by NYSE and Nasdaq to require each listed company to have a majority of independent directors on its board,¹⁸¹ to tighten the definition of

independent director,¹⁸² and to require the board to affirmatively determine that directors are independent.¹⁸³ There were some who disagreed, however. One commenter argued, in general, that boards should not be required to have a majority of independent directors.¹⁸⁴ With respect to NYSE's proposal to tighten the definition of independent director, one commenter expressed disapproval for what it described as an "expanding list of defined relationships."¹⁸⁵ With respect to Nasdaq's proposal to tighten the definition of independent director, another commenter stated its concern that the proposed standards would lead to smaller boards or to boards composed of individuals that might not have the best or most valuable experience.¹⁸⁶

With respect to the NYSE proposal regarding the manner in which boards may disclose determinations of independence, one commenter stated its belief that permitting boards to adopt categorical standards of independence and to disclose generally that directors meet these standards would ensure that privacy is maintained concerning the specifics of private financial matters.¹⁸⁷ Another commenter requested that, with respect to the barrier to independence of individuals having specified affiliations with "organizations" having a material relationship with the company, the NYSE clarify what "organization" means.¹⁸⁸ With respect to Nasdaq's proposed definition of independence, one commenter requested that Nasdaq clarify that "employee" does not include independent contractors and employees of other goods and service providers.

Proposals Regarding Prohibited Compensation for Independent Directors

With respect to the kinds of compensation received by a director or family member that would preclude a finding of independence, one commenter described the NYSE Direct Compensation Provision as a

¹⁷⁵ See Section III.C.10. *supra* for a discussion of the Code of Conduct Proposal.

¹⁷⁶ Of the comment letters received, 63 related to the NYSE Corporate Governance Proposal, 19 related to the Nasdaq Independent Director Proposal, five related to both the NYSE Corporate Governance Proposal and the Nasdaq Independent Director Proposal, two related to the Nasdaq Code of Conduct Proposal, and one related to the Nasdaq Issuer Applicability Proposal. The public files for the NYSE and Nasdaq proposals are located at the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549-0102. The public files for the rule proposals contain all comment letters on the proposals. A list of commenters on the NYSE and Nasdaq proposals (along with the citations to the letters referenced in this order), is included as Exhibit A to this order. The summary of comments contained in this section and the list of commenters contained in Exhibit A to this Order reflect comments received as of October 13, 2003.

¹⁷⁷ See Independent Community Bankers NYSE Letter, TIAA-CREF NYSE Letter, Herman E-mail, American Bankers Association NYSE Letter, Walden NYSE Letter, Railways Pension NYSE Letter, Social Investment NYSE Letter, Ethical Funds NYSE Letter, Ursuline Sisters NYSE Letter, Barclays NYSE Letter, SIO NYSE Letter, Council on Foundations NYSE Letter, Committee on Securities Regulation NYSE Letter, Intel Nasdaq Letter, Committee on Securities Regulation Nasdaq Letter, Paul Weiss Nasdaq Letter, National Venture Nasdaq Letter, and Qualcomm Nasdaq Letter.

¹⁷⁸ See American Bankers Association NYSE Letter, Walden NYSE Letter, Ursuline Sisters NYSE Letter, Barclays NYSE Letter, SIO NYSE Letter, America's Community Bankers NYSE Letter, America's Community Bankers Nasdaq Letter, Committee on Securities Regulation NYSE Letter, National Venture NYSE Letter, Investment Company Institute NYSE Letter, American Bankers Association Nasdaq Letter, Council on Foundations Nasdaq Letter, Committee on Securities Regulation Nasdaq Letter, National Venture Nasdaq Letter, Investment Company Institute Nasdaq Letter, and TI-USA Nasdaq Letter.

¹⁷⁹ See Council on Foundations NYSE Letter, Independent Community Bankers NYSE Letter, American Bankers Association NYSE Letter, Wachtell NYSE Memo, General Motors NYSE Letter, New York State Bar NYSE Letter, Wells Fargo NYSE Letter, Anadarko NYSE Letter, Winston & Strawn NYSE Letter, CNF NYSE Letter, Aetna NYSE Letter, Dow Lohnes NYSE Letter, Ameren NYSE Letter, Visteon NYSE Letter, Exxon NYSE Letter, Morrison Cohen NYSE Letter, Mirant NYSE Letter, American Society of Corporate Secretaries NYSE Letter, Computer Sciences NYSE Letter, Rockwell NYSE Letter, America's Community Bankers NYSE Letter, National Venture NYSE Letter, Peoples Energy NYSE Letter, Lorsch NYSE Letter, International Paper NYSE Letter, Agilent NYSE Letter, America's Community Bankers Nasdaq Letter, Whitney Nasdaq Letter, People's Energy Nasdaq Letter, America's Community Bankers Nasdaq Letter, Independent Community Bankers Nasdaq Letter, Kreider Nasdaq Letter, Committee on Securities Regulation Nasdaq Letter, Fulton Nasdaq Letter, and National Venture Nasdaq Letter (too restrictive), Herman E-mail, Eisenberg NYSE Letter, Mercer Delta NYSE Letter, TI-USA Nasdaq Letter, and Kolber Nasdaq E-mail (too lenient).

¹⁸⁰ See LeBoeuf NYSE Letter, New York State Bar NYSE Letter, America's Community Bankers NYSE Letter, Aetna NYSE Letter, Exxon NYSE Letter, Agilent NYSE Letter, Perkins Coie NYSE Letter, Mirant NYSE Letter, Computer Sciences NYSE Letter, Winston & Strawn NYSE Letter, General Motors NYSE Letter, Council on Foundations NYSE Letter, Committee on Federal Regulation on Securities Letter, New York City Bar NYSE Letter, Rutledge NYSE Letter, Intel Nasdaq Letter, America's Community Bankers Nasdaq Letter, Cenex Harvest Nasdaq Letter, People's Energy Nasdaq Letter, Paul Weiss Nasdaq Letter, and Committee on Securities Regulation Nasdaq Letter.

¹⁸¹ See Independent Community Bankers NYSE Letter, Hermann E-mail, American Bankers Association NYSE Letter, Walden NYSE Letter, Railways Pension NYSE Letter, Social Investment NYSE Letter, Ethical Funds NYSE Letter, Ursuline Sisters NYSE Letter, Barclays NYSE Letter, SIO

NYSE Letter, TIAA-CREF NYSE Letter, American Bankers Association Nasdaq Letter, and Independent Community Bankers Nasdaq Letter.

¹⁸² See TIAA-CREF NYSE Letter, Railways Pension NYSE Letter, Barclays NYSE Letter, and SIO NYSE Letter.

¹⁸³ See American Bankers Association NYSE Letter, TIAA-CREF NYSE Letter, and American Bankers Association Nasdaq Letter.

¹⁸⁴ See Johnsson E-Mail.

¹⁸⁵ See KPMG NYSE Letter.

¹⁸⁶ See America's Community Bankers Nasdaq Letter.

¹⁸⁷ See American Bankers Association NYSE Letter.

¹⁸⁸ See New York State Bar NYSE Letter.

“reasonable approach,”¹⁸⁹ while another commenter thought the proposal was too rigid because it would disqualify employees who were paid more than \$100,000 and did not have significant decision-making authority.¹⁹⁰ Some commenters requested clarification of this proposal. For example, one of these commenters asked whether “compensation” had a similar meaning to that given by the Commission in Rule 10A-3,¹⁹¹ and whether any of the following could be excluded: gains from investments in securities and dividends,¹⁹² restricted stock received by directors as part of their compensation for service as directors,¹⁹³ payments from banking transactions in the ordinary course of business,¹⁹⁴ and deferred compensation.¹⁹⁵ One commenter expressed its preference for the NYSE Direct Compensation Provision over the Nasdaq Payments Provision because the Nasdaq Payments Provision excluded individuals who received “payments,” which the commenter believed was too broad.¹⁹⁶ One commenter argued that either the \$100,000 threshold of the NYSE Direct Compensation Provision should be increased for larger companies, or the board should have the discretion to establish the appropriate threshold.¹⁹⁷ With respect to the Nasdaq Payments Provision, one commenter argued that an indication of non-independence based on the threshold amounts of payments received should be a rebuttable presumption as in the NYSE Direct Compensation Provision, rather than a bright line test.¹⁹⁸ Commenters advocated that the following should be excluded from these amounts: indirect payments, such as payments to related organizations,¹⁹⁹ payments from banking or brokerage transactions in the ordinary course of business,²⁰⁰ other items excluded from disclosure per Commission rules such as Item 404 of Form S-K,²⁰¹ and compensation for

service on board committees.²⁰² In contrast, one commenter stated that director’s fees should be the only compensation an independent director could receive from the company.²⁰³ In addition, one commenter stated its belief that the three-year look back should not apply to the Nasdaq Payments Provision because the board would already be required to consider previous employment in making an affirmative determination of director independence.²⁰⁴ One commenter expressed its strong support for the exception in the NYSE Direct Compensation Provision for compensation received by a director for former service as an interim Chairman or CEO, and recommended that Nasdaq include this exception in its proposal.²⁰⁵

Business Relationship Provisions

One commenter supported the NYSE Business Relationship Provision and represented that members of its corporate governance task force (which consists of representatives from both large and small, public and non-public banking organizations) were confident that the majority of directors sitting on the boards of banking organizations impacted by these listing standards would be able to satisfy this requirement.²⁰⁶ Other commenters argued that the NYSE Business Relationship Provision would be difficult to implement and would not, in many cases, be the most accurate measure of the materiality of a business relationship.²⁰⁷ Likewise, commenters argued that NYSE’s threshold of 2% was too low,²⁰⁸ the proposal was not appropriate for smaller companies,²⁰⁹ the proposal was ambiguous,²¹⁰ and that the existence of a commercial relationship should give rise only to a rebuttable presumption of lack of independence.²¹¹ Commenters were also concerned about the application of the proposal to family members.²¹² In addition, commenters argued that the

proposal should not apply to the following: Executive officers or employees of a company making the payments who seek to be independent directors of the company that is on the receiving end of the payments,²¹³ certain loans,²¹⁴ non-executive employees,²¹⁵ disqualification due to consolidation accounting principles,²¹⁶ and gross revenues received in certain competitively bid and public utility transactions.²¹⁷

With respect to the Nasdaq Business Relationship Provision, one commenter recommended defining “controlling shareholder.”²¹⁸

Interlocking Directorate Provisions

Two commenters supported the NYSE and Nasdaq Interlocking Directorate Provisions.²¹⁹ One commenter does not believe that the look-back provisions of the NYSE and Nasdaq Interlocking Directorate Provisions should apply because independence would seem to be compromised only if the listed company’s executives had the current ability to participate in determining the director’s compensation as an executive officer of the other entity.²²⁰ The commenter suggests that if the NYSE and Nasdaq look-back provisions are applied, then the service of the listed company’s executive, and the employment of the listed company’s director, at the other company should be required to have occurred at the same time during that five-year period.²²¹

Relationships of a Director with the Company’s Auditors

With respect to the NYSE’s proposal concerning relationships with an auditor, one commenter did not believe that the NYSE had sufficiently explained why a director’s affiliation with a company’s auditor would compromise the director’s independence.²²² In addition, several commenters argued that applying the proposals to family members would be too burdensome, given the small number of accounting firms that provide audit services to large publicly traded companies, and would be difficult to monitor. These commenters suggested

¹⁸⁹ See America’s Community Bankers NYSE Letter.

¹⁹⁰ See GM NYSE Letter.

¹⁹¹ See America’s Community Bankers NYSE Letter.

¹⁹² See Aetna NYSE Letter.

¹⁹³ See Exxon NYSE Letter.

¹⁹⁴ See America’s Community Bankers NYSE Letter.

¹⁹⁵ See New York State Bar NYSE Letter.

¹⁹⁶ See American Bankers Association NYSE Letter.

¹⁹⁷ See Wells Fargo NYSE Letter.

¹⁹⁸ See Committee on Securities Regulation Nasdaq Letter.

¹⁹⁹ See ABC Nasdaq Letter.

²⁰⁰ See America’s Community Bankers Nasdaq Letter, American Bankers Association Nasdaq Letter, Whitney Nasdaq Letter, and People’s Bank Nasdaq Letter.

²⁰¹ See Whitney Nasdaq Letter.

²⁰² See People’s Bank Nasdaq Letter.

²⁰³ See TI-USA Nasdaq Letter.

²⁰⁴ See America’s Community Bankers Nasdaq Letter.

²⁰⁵ See Arrow Electronics Letter.

²⁰⁶ See American Bankers Association NYSE Letter.

²⁰⁷ See Mirant NYSE Letter, Winston and Strawn NYSE Letter, CNF NYSE Letter, America’s Community Bankers NYSE Letter, and New York State Bar NYSE Letter.

²⁰⁸ See Anadarko NYSE Letter.

²⁰⁹ See Agilent NYSE Letter.

²¹⁰ See Perkins Coie NYSE Letter and Winston & Strawn NYSE Letter.

²¹¹ See Anadarko NYSE Letter, Aetna NYSE Letter, and Ameren NYSE Letter.

²¹² See Aetna NYSE Letter, Visteon NYSE Letter, and Mirant NYSE Letter.

²¹³ See CNF NYSE Letter.

²¹⁴ See Aetna NYSE Letter.

²¹⁵ *Id.*

²¹⁶ See Dow, Lohnes NYSE Letter.

²¹⁷ See Ameren NYSE Letter.

²¹⁸ See America’s Community Bankers Nasdaq Letter.

²¹⁹ See Council on Foundations Nasdaq Letter and American Bankers Association NYSE Letter.

²²⁰ See America’s Community Bankers Nasdaq Letter and America’s Community Bankers NYSE Letter.

²²¹ *Id.*

²²² See Computer Sciences NYSE Letter.

limiting the scope of the proposal.²²³ Furthermore, commenters requested clarification of the terms "external auditors,"²²⁴ "internal auditors,"²²⁵ "affiliated with,"²²⁶ and "executives."²²⁷ One commenter supported this proposal.²²⁸

With respect to the Nasdaq proposal on the same topic, one commenter suggested limiting the scope of the proposal by excluding from its prohibition partners or employees that provide only a minimal amount of work on the company's audit or who are brought in to assist on technical or industry-specific issues.²²⁹

Definition of Family Member

In general, many commenters criticized the proposed NYSE and Nasdaq definitions of family members for being too broad and impractical to apply.²³⁰ One commenter expressed its preference for NYSE's proposed definition,²³¹ and another commenter stated that NYSE's proposed definition is reasonable.²³²

Look-Back Periods and Their Phase-In

With respect to the look-back periods proposed by the NYSE and Nasdaq to disqualify former employees, auditor personnel, interlocking directors and their families, as applicable, for a specified time, two commenters argued that no look-back periods were necessary.²³³ One of these commenters recommended that Nasdaq clarify that the look-back would apply to any time within the three-year period, not the

entire three-year period.²³⁴ Two commenters²³⁵ approved of NYSE's proposal to phase-in the look-back periods but, along with other commenters,²³⁶ argued that a five-year look-back period would be too long. Some commenters argued that Nasdaq's look-back provisions should be phased-in as in the NYSE's proposal.²³⁷

Affiliates

With respect to how NYSE proposes to define independent directors, two commenters asked, absent other disqualifying factors, if a director that sits on the board of a company's affiliate could be an independent director with respect to that company.²³⁸

Application to Investment Companies

With respect to how Nasdaq proposes to define independent director, one commenter stated that whether a director of an investment company is independent should be determined exclusively under the provisions of section 2(a)(19) of the Investment Company Act.²³⁹

Banks and Banking Transactions

Several commenters stated their concern about the impact of both the NYSE and Nasdaq proposals on small community banks and the disqualification of otherwise independent directors due to ordinary course of business banking transactions.²⁴⁰ These commenters recommended that Nasdaq and NYSE amend their proposals accordingly. However, one of these commenters expressed its support for the NYSE proposal and represented that members of its corporate governance task force (which consists of representatives from both large and small, public and non-public banking organizations) were confident that the majority of directors sitting on the boards of banking organizations impacted by these listing

standards would be able to satisfy the proposed requirements.²⁴¹

Charities

One commenter argued that both companies and the charities they support would benefit from a bright line uniform rule that would apply to all charitable contributions without regard to the market on which a company is traded. The commenter stated its belief that Nasdaq's Business Relationship Provision would be a reasonable standard for assessing the effect of charitable contributions on a director's independence, and expressed its concern that NYSE-listed companies would be more likely to discontinue giving to charities than to expend the time and effort necessary to craft the categorical standards that would be needed under the NYSE proposal.²⁴²

Other Comments on Independence Proposals

Some commenters recommended strengthening the independence standards. For example, two commenters recommended that a former CEO should never be eligible to serve as an independent director.²⁴³ One of these commenters argued that the board should be required to take into account a director's relationship with senior management and other directors in making a determination of independence.²⁴⁴ Another commenter recommended barring investment institutions from having board seats in companies they have investments in.²⁴⁵ Three commenters recommended adding considerations such as ethnic and gender diversity of the board to the discussion of independence.²⁴⁶

With respect to the Nasdaq proposal, one commenter suggested defining "executive officer"—which appear in the Nasdaq Payments Provision, the Nasdaq Family of Executive Officer Provision, and the Nasdaq Business Relationship Provision—as defined in Rule 16a-1(f) of the Exchange Act, to prevent these proposals from disqualifying employees who have no policy-making role at the corporate level.²⁴⁷ The same commenter also recommended clarifying the meaning of

²²³ See Aetna NYSE Letter, Exxon NYSE Letter, Wells Fargo NYSE Letter, Morrison Cohen NYSE Letter, and New York State Bar NYSE Letter.

²²⁴ See Mirant NYSE Letter, America's Community Bankers NYSE Letter, and Computer Sciences NYSE Letter.

²²⁵ See America's Community Bankers NYSE Letter.

²²⁶ *Id.*

²²⁷ See Aetna NYSE Letter.

²²⁸ See American Bankers Association NYSE Letter.

²²⁹ See America's Community Bankers Nasdaq Letter.

²³⁰ See Intel Nasdaq Letter, People's Bank Nasdaq Letter, America's Community Bankers Nasdaq Letter, American Bankers Association Nasdaq Letter, Independent Community Bankers Nasdaq Letter, Kreider Nasdaq Letter, Mirant NYSE Letter, American Society of Corporate Secretaries NYSE Letter, America's Community Bankers NYSE Letter, Winston & Strawn NYSE Letter, Computer Sciences NYSE Letter, Aetna NYSE Letter, Exxon NYSE Letter, Wells Fargo NYSE Letter, New York State Bar NYSE Letter, and Rockwell NYSE Letter.

²³¹ See American Bankers Association Nasdaq Letter.

²³² See America's Community Bankers NYSE Letter.

²³³ See America's Community Bankers Nasdaq Letter and Independent Community Bankers Nasdaq Letter.

²³⁴ See America's Community Bankers Nasdaq Letter.

²³⁵ See America's Community Bankers NYSE Letter and American Bankers Association NYSE Letter.

²³⁶ See National Venture NYSE Letter and Independent Community Bankers NYSE Letter.

²³⁷ See American Bankers Association Nasdaq Letter, Committee on Securities Regulation Nasdaq Letter, Whitney Nasdaq Letter, and Independent Community Bankers Nasdaq Letter.

²³⁸ See Cleary NYSE Letter and LeBoeuf NYSE Letter.

²³⁹ See Investment Company Institute Nasdaq Letter.

²⁴⁰ See Independent Community Bankers NYSE Letter, American Bankers Association NYSE Letter, Wachtell NYSE Letter, America's Community Bankers NYSE Letter, Whitney Nasdaq Letter, American Bankers Association Nasdaq Letter, America's Community Bankers Nasdaq Letter, and Independent Community Bankers Nasdaq Letter.

²⁴¹ See American Bankers Association NYSE Letter.

²⁴² See Council on Foundations Nasdaq Letter and Council on Foundations NYSE Letter.

²⁴³ See TIAA-CREF NYSE Letter and Coleman NYSE Letter.

²⁴⁴ See TIAA-CREF NYSE Letter.

²⁴⁵ See Hermann E-mail, Social Investment NYSE Letter, Ethical Funds NYSE Letter, and Calvert NYSE Letter.

²⁴⁶ See Social Investment NYSE Letter, Ethical Funds NYSE Letter, and Calvert NYSE Letter.

²⁴⁷ See Intel Nasdaq Letter.

“subsidiary,” which appears in the Nasdaq Employee Provision, the Nasdaq Payments Provision, and the Nasdaq Family of Executive Officer Provision.

One commenter expressed its strong support for the position taken by both the NYSE and Nasdaq not to disqualify independent directors for ownership of even a significant amount of stock.²⁴⁸

Two commenters recommended that NYSE and Nasdaq apply a more lenient independence standard to smaller companies.²⁴⁹

With respect to the NYSE proposal, one commenter recommended that NYSE adopt the provision permitted by Rule 10A-3 that would allow a listed issuer to have one audit committee member that ceases to be independent for reasons outside the member's reasonable control for a limited amount of time, and to extend such provision to all independent directors and the other non-Rule 10A-3 independence requirements.²⁵⁰ Another commenter recommended adding a provision relating to appropriate procedures for a company to cure any defects in its compliance with the proposed new independence standards.²⁵¹

B. Separate Meetings for Independent Directors

Several commenters were in favor of the NYSE proposal to require separate executive sessions for non-management directors.²⁵² One commenter stated that it regarded this requirement as among the most important in improving the independence of the board.²⁵³ Another commenter criticized the proposal because it believes that it could lead to decisions being made without critical information available to management, and could raise liability issues for the non-management directors under state law if their decisions are determined to be harmful to the company or not in its best interest.²⁵⁴ The commenter suggested that the NYSE encourage these meetings, but not make them mandatory, so that each company could determine if the sessions would be productive. A third commenter stated its belief that requiring executive

sessions would have a divisive effect within boards of listed companies and would deprive directors of guidance by management.²⁵⁵ Another commenter argued that independent directors, not non-management directors, should be required to attend executive sessions, and that an independent director should be required to preside over the executive sessions.²⁵⁶

With respect to the Nasdaq proposal to require separate sessions for independent directors, one commenter stated its view that such a requirement could be burdensome, and recommended requiring regular meetings of non-management directors.²⁵⁷ Another commenter recommended that Nasdaq clarify what would be expected to occur at these meetings.²⁵⁸

C. Communications with Independent Directors

Commenters recommended that NYSE clarify its proposal that interested parties should have the ability to freely communicate with a company's non-management directors with respect to the identity of “interested parties;”²⁵⁹ how they should communicate with independent directors;²⁶⁰ what topics would be appropriate to direct to independent directors, instead of the entire board;²⁶¹ and whether management could be involved in screening communications and in reviewing and responding to concerns.²⁶² Another commenter recommended limiting the proposal to employees.²⁶³ With respect to the Nasdaq proposal, one commenter advocated that companies ensure that employees know that they would not be retaliated against for reports made in good faith.²⁶⁴

D. Compensation of Officers

Many commenters disapproved of the NYSE Compensation Committee Provision because the compensation committee would be given the sole

authority to determine CEO compensation.²⁶⁵ Commenters argued that the full board should have a role in making CEO compensation decisions,²⁶⁶ or that all independent directors should have a role in making CEO compensation decisions, perhaps even by deciding how CEO compensation decisions would be made.²⁶⁷ One commenter stated that the board should be permitted to allocate this responsibility to other committees or other groups of directors, as long as all members are independent, and that the compensation committee should be permitted to make a recommendation to be approved by all of the independent directors.²⁶⁸ Another commenter recommended that the NYSE make clear that the compensation committee could be given the discretion to make other decisions.²⁶⁹ Other commenters supported the proposal.²⁷⁰ One commenter provided recommendations for how the compensation committee should evaluate CEO performance.²⁷¹

With respect to the Nasdaq Compensation of Executives Provision, one commenter argued that it would not be necessary or appropriate to apply this proposal to investment companies.²⁷² With respect to both the NYSE Compensation Committee Provision and the Nasdaq Compensation of Executives Provision, two commenters asked how other compensation would be determined.²⁷³

E. Nomination of Directors

Several commenters supported the NYSE Nominating/Corporate Governance Committee Provision,²⁷⁴ and one commenter supported the exception that provides that nominating committee approval is not required where the right to nominate a director

²⁶⁵ See Business Roundtable NYSE Letter, American Society of Corporate Secretaries NYSE Letter, International Paper NYSE Letter, Lorsch NYSE Letter, Computer Sciences NYSE Letter, Peoples Energy NYSE Letter, and Pfizer NYSE Letter.

²⁶⁶ See Computer Sciences NYSE Letter, Pfizer NYSE Letter, and International Paper NYSE Letter.

²⁶⁷ See Business Roundtable NYSE Letter, Lorsch NYSE Letter, and Peoples Energy NYSE Letter.

²⁶⁸ See Business Roundtable NYSE Letter.

²⁶⁹ See Wells Fargo NYSE Letter.

²⁷⁰ See TIAA-CREF NYSE Letter, Walden NYSE Letter, Social Investment NYSE Letter, and Ethical Funds NYSE Letter.

²⁷¹ See MVC Associates NYSE E-mail.

²⁷² See Investment Company Institute Nasdaq Letter.

²⁷³ See KPMG NYSE Letter and America's Community Bankers Nasdaq Letter.

²⁷⁴ See TIAA-CREF NYSE Letter, Walden NYSE Letter, Social Investment NYSE Letter, Ethical Funds NYSE Letter, and Ursuline Sisters NYSE Letter.

²⁴⁸ See National Venture Nasdaq Letter and National Venture NYSE Letter.

²⁴⁹ See Independent Community Bankers NYSE Letter, Independent Community Bankers Nasdaq Letter, and America's Community Bankers Nasdaq Letter.

²⁵⁰ See Cleary NYSE Letter.

²⁵¹ See Financial Services Agency NYSE Letter.

²⁵² See TIAA-CREF NYSE Letter, Walden NYSE Letter, Social Investment NYSE Letter, Ethical Funds NYSE Letter, Barclays NYSE Letter, and SIO NYSE Letter.

²⁵³ See TIAA-CREF NYSE Letter.

²⁵⁴ See America's Community Bankers NYSE Letter.

²⁵⁵ See Independent Community Bankers NYSE Letter.

²⁵⁶ See Eisenberg NYSE Letter.

²⁵⁷ See People's Bank Nasdaq Letter.

²⁵⁸ See America's Community Bankers Nasdaq Letter.

²⁵⁹ See Committee on Securities Regulation NYSE Letter.

²⁶⁰ See America's Community Bankers NYSE Letter, Winston & Strawn NYSE Letter, Kerr-McGee NYSE Letter, Agilent NYSE Letter, and Committee on Securities Regulation NYSE Letter.

²⁶¹ See Winston & Strawn NYSE Letter.

²⁶² See Kerr-McGee NYSE Letter, Agilent NYSE Letter, and JP Financial NYSE Letter.

²⁶³ See Agilent NYSE Letter.

²⁶⁴ See America's Community Bankers Nasdaq Letter.

legally belongs to a third party.²⁷⁵ However, one commenter argued that the NYSE should permit director nomination responsibilities to be allocated to other committees or other groups of directors so long as all members are independent.²⁷⁶

With respect to the role of board committees generally, one commenter recommended that the proposed listing standards explicitly recognize the oversight role and the responsibilities of the board of directors as a whole.²⁷⁷

While one commenter supported the Nasdaq Director Nomination Provision,²⁷⁸ another commenter believed that the full board should be involved in the director nomination process, because otherwise all the independent directors may be friends and may not be independent in thought from one another.²⁷⁹ One commenter recommended clarifying that the proposal's exception for cases where the right to nominate a director legally belongs to a third party includes arrangements other than contractual arrangements.²⁸⁰ Another commenter recommended changing the 20% shareholder exception that had been included in Nasdaq's original proposal by deleting the phrase, "and is not independent as defined in Rule 4200 because that director is also an officer."²⁸¹ In addition, another commenter argued that the proposal should not apply to investment companies whose independent directors are nominated by independent directors.²⁸²

F. Controlled Company Exemption

While one commenter supported both the NYSE and Nasdaq proposals to exempt controlled companies from some of the independent director requirements,²⁸³ two commenters did not support the NYSE proposal.²⁸⁴ One of these commenters argued that it would disenfranchise minority shareholders,²⁸⁵ and the other commenter argued that the exemption should apply only where the measure of "control" is both voting and economic

control, because corporations with two-tier classes of voting stock, where the minority economic interests exercise voting control because of supermajority voting rights, are particularly subject to the potential for abuse.²⁸⁶ With respect to the Nasdaq proposal, one commenter recommended adding language to make clear that controlled companies choosing not to rely on the exemption need not include any special disclosures about their controlled status.²⁸⁷

G. Audit Committee Charter

In general, several commenters supported increasing the authority and responsibility of the audit committee.²⁸⁸ However, one commenter argued that final authority over audit committee issues should rest with all the independent directors.²⁸⁹ With respect to the NYSE Audit Committee Charter Provision, several commenters were concerned with the extent of the audit committee's proposed new responsibilities.²⁹⁰ For example, one of these commenters argued that the audit committee should be permitted to delegate non-financial risk management activities to other committees so long as such committee reports to the audit committee.²⁹¹ Another commenter argued that the audit committee should not be responsible for legal and regulatory compliance, and that investing a single committee with an overload of functions may dilute resources of the committee that should be available to its accounting and financial oversight role.²⁹² A third commenter argued that there were too many items for the audit committee to discuss and that the audit committee needs the flexibility to set its agenda to focus on the company's most significant financial reporting and corporate governance issues.²⁹³ One of the commenters also argued that financial statements are the representations and responsibility of management, not the audit committee.²⁹⁴

Further, one commenter requested clarification of whether advance discussion of quarterly financial statements would be required and, if so,

argued that the audit committee should be permitted to decide whether this requirement should apply to the earnings release or the quarterly financial statements.²⁹⁵ Another commenter recommended excluding investment companies from the proposed requirement that audit committee members discuss earnings press releases as well as financial information and earnings guidance provided to analysts and rating agencies.²⁹⁶

With respect to the Nasdaq Audit Committee Charter Provision, the same commenter supported the proposed requirements regarding complaints, particularly their flexibility; and favored the proposal to grant the audit committee the authority to engage and fund outside advisors.²⁹⁷ However, the commenter also argued that the Nasdaq proposal should be revised to make clear that each Nasdaq-listed company would be required to provide appropriate funding to the audit committee.²⁹⁸ Another commenter argued that the Nasdaq proposal should be revised to require audit committee charters to state that one of the audit committee's purposes must be to assist the board in oversight of the company's compliance with laws and regulations, which would be consistent with the NYSE Audit Committee Charter Provision.²⁹⁹

Several commenters, writing before the NYSE and Nasdaq filed amendments to the proposals, pointed out that the NYSE and Nasdaq Audit Committee Charter Provisions should be revised so that the responsibilities required of the audit committee would comply with the requirements of Rule 10A-3.³⁰⁰

H. Audit Committee Independence

With respect to the NYSE proposal on audit committee independence, two commenters supported the proposal to require an independent audit committee.³⁰¹ However, several commenters were concerned about the interplay between the proposal and the requirements of Rule 10A-3. For example, one commenter argued that the proposal should incorporate the various exceptions and accommodations

²⁷⁵ See National Venture NYSE Letter.

²⁷⁶ See American Society of Corporate Secretaries NYSE Letter.

²⁷⁷ See Securities Committee NYSE Letter.

²⁷⁸ See National Venture Nasdaq Letter.

²⁷⁹ See Kolber Nasdaq Letter.

²⁸⁰ See Cenex Harvest Nasdaq Letter.

²⁸¹ See Kreider Nasdaq Letter.

²⁸² See Investment Company Institute Nasdaq Letter.

²⁸³ See National Venture NYSE Letter and National Venture Nasdaq Letter.

²⁸⁴ See International Corporate Governance NYSE Letter and Cascade NYSE Letter.

²⁸⁵ See International Corporate Governance NYSE Letter.

²⁸⁶ See Cascade NYSE Letter.

²⁸⁷ See People's Bank Nasdaq Letter.

²⁸⁸ See TIAA-CREF NYSE Letter, National Association of State Treasurers NYSE Letter, Railways Pension NYSE Letter, Barclays NYSE Letter, and SIO NYSE Letter.

²⁸⁹ See Computer Sciences NYSE Letter.

²⁹⁰ See American Society of Corporate Secretaries NYSE Letter, KPMG NYSE Letter, and Computer Sciences NYSE Letter.

²⁹¹ See American Society of Corporate Secretaries NYSE Letter.

²⁹² See KPMG NYSE Letter.

²⁹³ See Computer Sciences NYSE Letter.

²⁹⁴ See KPMG NYSE Letter.

²⁹⁵ See Wells Fargo NYSE Letter.

²⁹⁶ See Investment Company Institute NYSE Letter.

²⁹⁷ See Investment Company Institute Nasdaq Letter.

²⁹⁸ *Id.*

²⁹⁹ See TI-USA Nasdaq Letter.

³⁰⁰ See Committee on Securities Regulation NYSE Letter, New York State Bar NYSE Letter, Financial Services Agency NYSE Letter, and Investment Company Institute Nasdaq Letter.

³⁰¹ See Social Investment NYSE Letter and Ethical Funds NYSE Letter.

codified in Rule 10A-3.³⁰² Another commenter recommended clarifying whether the Commission's Rule 10A-3 definition of impermissible compensation should be applied.³⁰³ A third commenter asked: (1) Which definition of "immediate family member" should be used; (2) whether NYSE intends to apply a five-year look-back; (3) whether NYSE intends to consider payments made in any period prior to board service; and (4) whether NYSE intends to consider whether payments are made to a family member or to a firm providing advisory or professional services to the listed company with which a director is or was associated in the capacities referred to in Rule 10A-3(e)(8).³⁰⁴

Another commenter requested that NYSE determine that banking transactions in the ordinary course of business between banks and their directors and their affiliated companies would not constitute a material relationship that would impair an audit committee member's independence.³⁰⁵

With respect to the Nasdaq proposal on audit committee independence, one commenter disapproved of the application of a three-year look back, and was concerned that this provision would deprive a company of a high-quality audit committee member who has an appreciation for the operational aspect of the business.³⁰⁶ The commenter argued that no look-back was necessary because directors have a legal duty to act independently of previous allegiances. Although the commenter opposed any look-back, it commented that shortening the look-back to one year would significantly mitigate the adverse effect.

Two commenters approved of the provisions in Nasdaq's original proposal to include a bright line test that would bar directors who own or control 20% or more of a company's stock.³⁰⁷ One commenter requested further clarification of this provision.³⁰⁸ Another commenter argued that directors who own more than 20% of a company's stock are the directors who are most independent of management because they have a stake in the firm apart from the compensation they

receive as directors, and often there is no indicia whatsoever of control.³⁰⁹ The same commenter argued that the proposed standard could be highly disruptive, expensive and counterproductive.³¹⁰

Other commenters requested clarification of who Nasdaq would consider to be an affiliate.³¹¹ For example, one of these commenters requested more guidance as to what factors ought to be considered in determining whether an individual is an affiliate.³¹² Another commenter asked whether a director could serve on both the board of a holding company and the board of a subsidiary of the holding company.³¹³ Two other commenters expressed concern about the effect of banking relationships.³¹⁴

Although one commenter supported Nasdaq's proposal to allow certain leniencies in exceptional and limited circumstances, it argued that a company should not be required to disclose its use of these exceptions in a proxy because that would discourage use of the exceptions. The commenter stated that, instead, a company should be required to disclose its use of these exceptions in a report to Nasdaq.³¹⁵ Another commenter stated that it would be helpful for Nasdaq to clarify the relationship between the Nasdaq proposal and the requirements of Rule 10A-3, such as whether the same definition of family member and application of a look-back applies to both.³¹⁶

One commenter requested clarification of the relationship between current Nasdaq rules addressing audit committees and the Nasdaq Audit Committee Provision.³¹⁷

I. Financial Background of Audit Committee Members

With respect to the NYSE and Nasdaq proposals on the requisite background of audit committee members, two commenters recommended harmonizing the two proposals.³¹⁸ One of these

commenters recommended modifying the NYSE proposal to require audit committee members to be financially literate at the time they join the audit committee.³¹⁹ The other commenter recommended modifying the Nasdaq proposal to provide that an individual who satisfies the Commission's definition of an audit committee financial expert would be qualified to be an audit committee member.³²⁰

With respect to the NYSE and Nasdaq proposals to require at least one member of the audit committee to have accounting or related financial management expertise, one commenter requested confirmation that past and current employment as a venture capitalist would allow a director to meet this requirement on a per se basis.³²¹ The commenter also recommended that the NYSE make clear that "accounting or related financial management experience" does not require any particular background, certification or education.³²²

J. NYSE Audit Committee Member Simultaneous Service Provision

With respect to the NYSE proposal limiting the permissibility of simultaneous service on more than three audit committees, one commenter recommended moving this proposal to a different section of the NYSE proposal because it does not relate to independence.³²³ Another commenter questioned whether the proposed requirement would be mandatory because it appears in the commentary, and argued that because it is difficult to generalize about which directors are likely to have adequate time to carry out the duties of the committee, it should apply only to directors who are currently functioning in active senior executive roles of listed companies.³²⁴ A third commenter strongly recommended that in application of the proposed requirement to investment companies, a "fund complex" should be treated as one company because: (1) It is common practice in the investment company industry for the same directors to serve on the audit committee of one or more funds in a complex; (2) an investment company's financial

and Committee on Securities Regulation Nasdaq Letter.

³¹⁹ See Investment Company Institute NYSE Letter.

³²⁰ See Committee on Securities Regulation Nasdaq Letter.

³²¹ See National Venture NYSE and Nasdaq Letters.

³²² See National Venture NYSE Letter.

³²³ See American Society of Corporate Secretaries NYSE Letter.

³²⁴ See GM NYSE Letter.

³⁰² See Cleary NYSE Letter.

³⁰³ See America's Community Bankers NYSE Letter.

³⁰⁴ See Committee on Federal Regulation of Securities Letter.

³⁰⁵ See Independent Community Bankers NYSE Letter.

³⁰⁶ See National Venture Nasdaq Letter.

³⁰⁷ See National Venture Nasdaq Letter and Paul Weiss Nasdaq Letter.

³⁰⁸ See America's Community Bankers Nasdaq Letter.

³⁰⁹ See Wachtel Nasdaq Letter.

³¹⁰ *Id.*

³¹¹ See Paul Weiss Nasdaq Letter, America's Community Bankers Nasdaq Letter, American Bankers Association Nasdaq Letter, and Investment Company Institute Nasdaq Letter.

³¹² See Paul Weiss Nasdaq Letter.

³¹³ See America's Community Bankers Nasdaq Letter.

³¹⁴ See American Bankers Association Nasdaq Letter and Independent Community Bankers Nasdaq Letter.

³¹⁵ See Paul Weiss Nasdaq Letter.

³¹⁶ See Committee on Securities Regulation Nasdaq Letter.

³¹⁷ See America's Community Bankers NYSE Letter.

³¹⁸ See Investment Company Institute NYSE Letter, Investment Company Institute Nasdaq Letter,

statements are less complicated and therefore audit committee oversight requires less time; and (3) all funds in a fund complex typically rely on the same accounting system and are subject to the same internal controls and policies.³²⁵

K. Internal Audit Function

With respect to the NYSE proposal to require an internal audit function at all listed companies, one commenter recommended evaluating whether this requirement would be identical to the requirements of Rule 10A-3.³²⁶ If the rules were not identical, the commenter recommended delaying the imposition of additional requirements until those required by federal law have been adopted and implemented, and their efficacy evaluated after a reasonable amount of time.³²⁷ Two commenters argued that investment companies should be excluded from the internal audit requirement.³²⁸ A third commenter strongly recommended that Nasdaq implement the same requirement.³²⁹

L. NYSE Corporate Governance Guidelines

With respect to the NYSE proposal relating to corporate governance guidelines, one commenter strongly supported the proposal, particularly the concept of requiring director orientation for new directors and continuing education for all directors.³³⁰ Two other commenters also supported requiring director orientation.³³¹ Another commenter strongly supported requiring annual evaluations by the board,³³² and one commenter supported requiring board and committee assessments.³³³ Two of the commenters also recommended that evidentiary protection be provided in connection with any evaluations or assessments made by the board or its committees.³³⁴

While two other commenters supported requiring corporate governance guidelines, they argued that such guidelines should promote ethical guidelines for conducting core business, and that director orientation should

include social and environmental risk management, as well as training on corporate social responsibility.³³⁵

Another commenter stated that the reference to charitable contributions in the proposed commentary to the guideline topic relating to director compensation was too vague.³³⁶ This commenter recommended deleting the reference in its entirety or revising it to cover only the situation in which a director is permitted, as a perk of his or her position, to recommend a corporate gift to a favorite charity.³³⁷

M. Code of Business Conduct and Ethics

With respect to the NYSE proposal regarding codes of business conduct and ethics, one commenter supported the proposal and stated that it will help companies manage conflicts of interest.³³⁸ Five other commenters also supported the proposal,³³⁹ but four of these commenters argued that it should deal with a broader scope of issues including environmental and social practices.³⁴⁰ Two of these commenters promoted the Global Reporting Initiative, which provides a uniform disclosure policy and extends the reach of corporate social responsibility to economically, environmentally and socially sustainable business practices.³⁴¹ In addition, one commenter recommended that the NYSE require that CEOs endorse the codes with their signatures.³⁴²

One commenter supported the proposal to require companies to disclose waivers.³⁴³ Another commenter argued that the NYSE should require companies to disclose only a waiver of material terms of their codes because requiring disclosure of any waivers would be too burdensome and would discourage companies from adopting comprehensive codes.³⁴⁴ With respect to the Nasdaq Code of Conduct Proposal, one commenter supported the proposal, but recommended that Nasdaq require its listed companies to publish a summary of the compliance processes

in place to support the code.³⁴⁵ Another commenter also supported the proposal, but recommended that Nasdaq limit the proposed disclosure requirement to waivers of material terms of the code, because requiring disclosure of any waivers would be too burdensome and would discourage companies from adopting comprehensive codes.³⁴⁶ The commenter also stated that the proposal should address "implicit waivers," which would occur when a company fails to take action against a violation of the code. The commenter also recommended that Nasdaq permit waivers to be approved either by the board or a committee of the board to give listed companies the flexibility to place the oversight of a company's code of conduct within the jurisdiction of a particular committee if that structure would be more effective and appropriate.

Another commenter recommended that Nasdaq modify its proposal to provide that investment companies that are already subject to code of ethics and other requirements pursuant to rules under the Investment Company Act would be deemed to satisfy any new Nasdaq requirements regarding codes of conduct.³⁴⁷ The commenter argued that this modification would be consistent with Nasdaq's intentions and the NYSE proposal.

N. Noncompliance

One commenter urged the NYSE and Nasdaq to modify their proposals to permit transitional periods of noncompliance, distinct from any similar procedures for other listing standards.³⁴⁸

O. CEO Certification

Several commenters supported the NYSE proposal to require a company's CEO to certify annually that he or she is not aware of any violation of the Exchange's corporate governance rules.³⁴⁹ One of these commenters claimed that requiring CEO certification has caused many companies to engage in better due diligence about their financial statements.³⁵⁰ Other commenters disapproved of the proposal.³⁵¹ One of the commenters opposing the proposal argued that

³²⁵ See Investment Company Institute NYSE Letter.

³²⁶ See Committee on Securities Regulation NYSE Letter.

³²⁷ *Id.*

³²⁸ See Investment Company Institute NYSE Letter and Sullivan & Cromwell NYSE Letter.

³²⁹ See TI-USA Nasdaq Letter.

³³⁰ See TIAA-CREF NYSE Letter.

³³¹ See Walden NYSE Letter and Ursuline Sisters NYSE Letter.

³³² See Mercer Delta NYSE Letter.

³³³ See Boardroom Consultants NYSE Letter.

³³⁴ See Mercer Delta NYSE Letter and Boardroom Consultants NYSE Letter.

³³⁵ See Social Investment NYSE Letter and Ethical Funds NYSE Letter.

³³⁶ See Council on Foundations NYSE Letter.

³³⁷ *Id.*

³³⁸ See TIAA-CREF NYSE Letter.

³³⁹ See Barclays NYSE Letter, Walden NYSE Letter, Social Investment NYSE Letter, Ursuline Sisters NYSE Letter, and SIO NYSE Letter.

³⁴⁰ See Walden NYSE Letter, Social Investment NYSE Letter, Ursuline Sisters NYSE Letter, and SIO NYSE Letter.

³⁴¹ See Walden NYSE Letter, and SIO NYSE Letter.

³⁴² See Social Investment NYSE Letter.

³⁴³ See Railways Pension NYSE Letter.

³⁴⁴ See America's Community Bankers NYSE Letter.

³⁴⁵ See TIAA-CREF Nasdaq Letter.

³⁴⁶ See America's Community Bankers Nasdaq Letter.

³⁴⁷ See ICI 2002-139 Letter.

³⁴⁸ See Committee on Federal Regulation of Securities Letter.

³⁴⁹ See TIAA-CREF NYSE Letter, Walden NYSE Letter, Railways Pension NYSE Letter, Ursuline Sisters NYSE Letter, and Barclays NYSE Letter.

³⁵⁰ See TIAA-CREF NYSE Letter.

³⁵¹ See Computer Sciences NYSE Letter and Agilent NYSE Letter.

requiring CEO certification is too high of a standard given the myriad of rules and standards facing listed companies, and recommended requiring a representation from the CEO, rather than a certification.³⁵² The other commenter argued that the NYSE proposal should be modified to require notification of material noncompliance with the new standards by the company, and not the CEO in his or her individual capacity, for the following reasons: (1) Certification could still be made if the CEO was unavailable or unwilling to make the certification; (2) the proposal adds an element of personal liability to the CEO that the commenter believes is unduly burdensome and is not contemplated by Rule 10A-3, which only applies to non-compliance with audit-related matters; and (3) the requirement is more onerous and time-consuming than the annual certification requirement.³⁵³ The commenter also recommended that the NYSE make clear that the event that triggers the reporting requirement would not create a private cause of action against the company or the CEO.

One commenter recommended that the proposal be modified to provide that the CEO certify that he or she is not aware of any "material and ongoing" violations, and that the NYSE should clarify what is not material or ongoing.³⁵⁴

Another commenter asked whether a company would be required to include a full text of these certifications, or a statement that the certifications have been made in its annual report.³⁵⁵

P. NYSE Public Reprimand Provision

Two commenters supported the NYSE proposal to permit the Exchange to issue public reprimand letters to non-compliant companies.³⁵⁶ One commenter recommended that the NYSE specify that any new NYSE corporate governance rules should not create a private right of action for non-compliance.³⁵⁷ Another commenter recommended that the NYSE research and revise this proposal separately from the remainder of the corporate governance reforms.³⁵⁸ The commenter also stated that a provision for due process prior to issuance of a reprimand letter would be necessary for fact

checking and an opportunity to remedy the company's non-compliance.³⁵⁹

Q. Other Exemptions

One commenter strongly concurred with NYSE's exemption for closed-end funds.³⁶⁰ Another commenter approved of the NYSE exemption for companies in bankruptcy and urged Nasdaq to adopt a similar exemption.³⁶¹

R. Application of Rules to Foreign Private Issuers

Several commenters supported the NYSE proposal regarding private foreign issuers.³⁶² A few commenters recommended that the NYSE modify the proposal to clarify that foreign issuers would be permitted to take advantage of the accommodations for foreign issuers set forth in Rule 10A-3.³⁶³

With respect to the Nasdaq proposal regarding foreign private issuers, one commenter argued that, consistent with the NYSE proposal, the Nasdaq proposal should be amended to: (1) Automatically exempt foreign private issuers from the proposed corporate governance requirements (except for Rule 10A-3 requirements); (2) synchronize its effective date with Rule 10A-3 requirements; and (3) require disclosure of exemptions and alternative measures in a company's first annual report covering the fiscal year ending on or after July 31, 2005.³⁶⁴

S. Implementation Schedule

With respect to the NYSE's proposed implementation schedule, one commenter criticized what it viewed as a long delay in implementation of the new requirements.³⁶⁵ Another commenter recommended coordinating the effective dates and transition periods with Rule 10A-3 requirements.³⁶⁶

With respect to Nasdaq's proposed implementation schedule for its Independent Director Proposal, one commenter recommended that Nasdaq adopt transition periods for compliance for newly-listed companies similar to the transition periods outlined in the NYSE proposal.³⁶⁷ Two commenters

recommended that Nasdaq adopt transition periods for compliance for companies with classified boards similar to the transition periods outlined in the NYSE proposal.³⁶⁸ Another commenter recommended granting small business issuers additional time to come into compliance.³⁶⁹

IV. Amendments to NYSE and Nasdaq Proposals

The discussion in Sections II.B. and C. above reflects revisions proposed in the amendments to the NYSE and Nasdaq proposals that were submitted by the NYSE and Nasdaq following publication of the NYSE Notice and the Nasdaq Notice. The discussion below summarizes those revisions.

In Amendment No. 2 to its Corporate Governance Proposal, the NYSE proposed revisions in a number of areas. The proposed revisions in Amendment No. 2 would:

- Conform the compliance dates and transition periods with those mandated for audit committees by Rule 10A-3 under the Exchange Act;
- Provide phase-in periods with respect to certain requirements for companies listing in conjunction with an initial public offering, companies emerging from bankruptcy, and companies that ceased to be Controlled Companies;
- Revise the "look-back" periods so that the independence tests would have a one year look-back during the first year after Commission approval of the new standards, with the full look-back period becoming applicable after the end of that first year, and would shorten the periods from five years to three years;
- Clarify that when applying look-back provisions to family members, listed companies need not consider individuals who are no longer family members due to separation or divorce, or individuals who have died or become incapacitated;
- Indicate that references to "company" would include any parent or subsidiary in a consolidated group with the company;
- Clarify the NYSE Employee Provision to provide that a director who is an employee, or whose immediate family member is an executive officer, of the company would not be considered independent until three years after the end of such employment relationship;
- Provide that employment as an interim Chairman or CEO would not

³⁵⁹ *Id.*

³⁶⁰ See Investment Company Institute NYSE Letter.

³⁶¹ See Committee on Federal Regulation of Securities Letter.

³⁶² See Committee on Securities Regulation NYSE Letter, TIAA-CREF NYSE Letter, and Walden NYSE Letter.

³⁶³ See Cleary NYSE Letter and Financial Services Agency NYSE Letter.

³⁶⁴ See S&C 2002-138 Letter.

³⁶⁵ See Eisenberg NYSE Letter.

³⁶⁶ See Computer Sciences NYSE Letter.

³⁶⁷ See Committee on Securities Regulation Nasdaq Letter.

³⁵² See Computer Sciences NYSE Letter.

³⁵³ See Agilent NYSE Letter.

³⁵⁴ See Committee on Securities Regulation NYSE Letter.

³⁵⁵ See Ogden Newell NYSE Letter.

³⁵⁶ See TIAA-CREF NYSE Letter and Barclays NYSE Letter.

³⁵⁷ See Committee on Securities Regulation NYSE Letter.

³⁵⁸ See Computer Sciences NYSE Letter.

³⁶⁸ See Committee on Securities Regulation Nasdaq Letter and Whitney Nasdaq Letter.

³⁶⁹ See National Venture Nasdaq Letter.

disqualify a director from being considered independent following that employment;

- Revise the NYSE Direct Compensation Provision to be a bright-line test, rather than a rebuttable presumption and clarify that immediate family member compensation would need only to be considered if the family member is an executive officer of the listed company;

- Revise the NYSE Business Relationship Provision to test all payments (whether to or from the listed company) against the consolidated gross revenues of the director's company, rather than also testing them against the listed company;

- Apply the look-back period in the NYSE Business Relationship Provision only to the financial relationship between the listed company and the current employer of the director, and not require the listed company to consider former employment of the director or family member;

- Clarify in the Commentary to the NYSE Business Relationship Provision that listed companies must disclose contributions to a charity of which a director serves as an executive officer, if the contributions satisfy the proposal's threshold test;

- Recommend that listed companies should hold an executive session limited solely to independent directors at least once a year;

- Revise the NYSE Compensation Committee Provision to clarify that all independent directors may be involved in approving the CEO's compensation and that the board in general is not precluded from discussing CEO compensation;

- Restructure the audit committee provisions to clearly define the audit committee requirements applicable to listed companies pursuant to Rule 10A-3;

- Exclude closed-end funds from specified provisions of section 303A, in recognition of the additional regulation to which closed-end funds are subject under the Investment Company Act;

- Require open-end funds to comply with the requirements of section 303A(6), which implement Rule 10A-3 under the Exchange Act;

- Require business development companies to comply with all of the provisions of section 303A applicable to domestic issuers, but use the "interested person" standard under section 2(a)(19) of the Investment Company Act for purposes of determining director independence; and

- Require the audit committees of open-end and closed-end funds to establish procedures for the

confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the fund, as well as employees of the fund.

In Amendment No. 3 to its Corporate Governance Proposal, NYSE proposed to require that the audit committee charter of a closed-end or open-end fund address the responsibility of the audit committee to establish procedures for the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters, but not to require the procedures to be set forth in the charter, as would have been required by Amendment No. 2.

In Amendment No. 3 to the Nasdaq Independent Director Proposal, Nasdaq proposed revisions to various aspects of its proposal. The proposed revisions in Amendment No. 3 would:

- Narrow the definition of "Family Member;"

- Expand the relationships that would preclude a finding of independence to apply not only to directors, but also to family members of directors;

- Exclude non-discretionary charity match programs from the definition of payments that would preclude a finding of independence;

- Exclude from the Nasdaq Payments Provision loans permitted under section 13(k) of the Exchange Act;

- Expand the scope of the relationships with the company's outside auditor that preclude a finding of independence;

- Amend the Interpretive Material associated with the definition of independence to provide clarification regarding applicability of the rule, particularly with respect to directors associated with law firms, and with respect to the meaning of the term "executive officer;"

- Retain bright-line tests for determining whether a director is independent;

- Retain the same standards for both large and smaller companies;

- Add a requirement that issuers identify in their proxy those directors that the board has determined to be independent;

- Clarify that independent committees may either take action or recommend that the board take action;

- Clarify that the new requirements relating to nominations committees would not apply in cases where the right to nominate a director legally belongs to a third party, or the company

is already subject to a legally binding obligation that requires a director nomination structure inconsistent with the rule;

- Add a requirement for a nominations committee charter;

- Add a requirement that Controlled Companies be subject to the independent director executive session requirement;

- Remove a provision that would have allowed one director holding 20% or more of the company's stock to serve on the nominations committee although the director would not be independent because that director is also a company officer;

- Conform the proposals relating to audit committees to Rule 10A-3;

- Clarify that directors who have participated in the preparation of the financial statements of the company during the past three years cannot serve on the audit committee;

- Add cure periods with respect to the audit committee and majority independent board requirements that are generally consistent with the cure periods in Rule 10A-3, but extend to board vacancies as well as circumstances where a director ceases to be independent for reasons outside the director's control;

- Provide a different measure of independence for investment companies, consistent with the Investment Company Act;

- Expand NASD Rule 4350(d)(3) and its Interpretive Material to provide that audit committees of investment companies must establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company;

- Clarify that a director who qualifies as an audit committee financial expert under Item 401(h) of Regulation S-K or Item 401(e) of Regulation S-B is presumed to qualify as a financially sophisticated audit committee member under NASD Rule 4350(d)(2)(A); and
- Add a requirement that issuers must notify Nasdaq of any material non-compliance with NASD Rule 4350.

In amendments to the Nasdaq Issuer Applicability Proposal, Nasdaq proposed revisions in a number of areas, including in response to public comments or suggestions from Commission staff. The proposed revisions would:

- Clarify the applicability of the rules to foreign issuers;

- Clarify that: (1) Investment companies (including business development companies) are subject to all the requirements of NASD Rule 4350, except that registered management investment companies are exempt from the requirements of NASD Rule 4350(c); (2) asset-backed issuers and certain other passive issuers are exempt from the requirements of NASD Rule 4350(c) and (d); and (3) certain cooperative entities are exempt from NASD Rule 4350(c); but that each of these entities must comply with all federal securities laws, including Rule 10A-3;

- Set forth the dates by which issuers would be required to come into compliance with the proposed rule changes that are the subject of this Order;

- Add new Rules 4200A and 4350A to incorporate the sections of Rules 4200 and 4350 that would continue to apply until the proposed rule changes become operative; and

- Exempt registered management investment companies, asset-backed issuers, and unit investment trusts from the requirement of proposed subsection (n) of NASD Rule 4350 regarding codes of conduct.

In addition, Nasdaq amended its Code of Conduct Proposal to clarify that any waivers of a company's code of conduct for directors or executive officers would be required to be disclosed in a Form 8-K within five days.³⁷⁰

V. Discussion

After careful review, the Commission finds that the NYSE Corporate Governance Proposal, as amended, is consistent with the Exchange Act and the rules and regulations promulgated thereunder applicable to a national securities exchange and, in particular, with the requirements of section 6(b) of the Exchange Act.³⁷¹ Specifically, the Commission finds that the NYSE Corporate Governance Proposal, as amended, is consistent with section 6(b)(5) of the Exchange Act³⁷² in that it is designed, among other things, to facilitate transactions in securities; to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and in general, to protect investors and the

public interest, and does not permit unfair discrimination among issuers.

After careful review, the Commission finds that the Nasdaq Independent Director Proposal, as amended; the Nasdaq Going Concern Proposal; the Nasdaq Related Party Transactions Proposal, as amended; the Nasdaq Issuer Applicability Proposal, as amended; and the Nasdaq Code of Conduct Proposal, as amended, are consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities association.³⁷³ The Commission finds that these Nasdaq proposed rule changes, as amended, are consistent with provisions of section 15A of the Exchange Act,³⁷⁴ in general, and with section 15A(b)(6) of the Exchange Act,³⁷⁵ in particular, in that they are designed, among other things, to facilitate transactions in securities; to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and in general, to protect investors and the public interest, and do not permit unfair discrimination among issuers.

Recent corporate scandals have shaken investor confidence in the securities markets because of breaches of trust, failures of responsibility, breakdowns in governance, and lack of candid disclosure. These developments led to the enactment of the Sarbanes-Oxley Act, which, among other things, directed the Commission to undertake rulemaking in a number of areas, including mandatory listing standards to be adopted by self-regulatory organizations ("SROs") concerning the composition and function of listed issuers' audit committees. One of the main goals of the Sarbanes-Oxley Act is to improve investor confidence in the financial integrity of listed issuers, which in turn will promote confidence in the markets for listed issuers' securities.

Through their corporate governance listing standards, the SROs play an important role in assuring that their listed issuers establish good governance practices and maintain effective oversight of the reliability of corporate

financial information. A few years ago, several exchanges and Nasdaq implemented rules to strengthen the effectiveness of their listed companies' audit committees; these rules were adopted in response to the recommendations of the Blue Ribbon Committee.³⁷⁶ More recently, at the urging of the Commission's Chairman at the time, the exchanges and Nasdaq undertook a review of their corporate governance listing standards with the objective of strengthening their rules. In April of this year, in response to a directive of the Sarbanes-Oxley Act, the Commission adopted Rule 10A-3 under the Exchange Act. Rule 10A-3 requires the rules of the national securities exchanges or national securities associations to prohibit the initial or continued listing of any security of an issuer that is not in compliance with the rule's requirements regarding issuer audit committees. As a result of Commission and Congressional initiatives, the NYSE and Nasdaq proposed rule changes that are intended to assure that a listed issuer's board of directors and key committees are comprised in a manner that is designed to provide an objective oversight role and that directors and management adhere to high standards of conduct. In addition, the proposals are intended to strengthen the independence of audit committees, including by establishing rules designed to assure listed issuers' compliance with the requirements of Rule 10A-3.

In the Commission's view, the NYSE and Nasdaq proposals that are the subject of this Order will foster greater transparency, accountability and objectivity in the oversight by, and decision-making processes of, the boards and key committees of listed issuers. The NYSE and Nasdaq proposals also will promote compliance with high standards of conduct by the issuers' directors and management. In addition, in the Commission's view, the NYSE Corporate Governance Proposal and the Nasdaq Independent Director Proposal satisfy the mandate of Rule 10A-3, which requires that the rules of a national securities exchange or national securities association prohibit the initial or continued listing of any security of an issuer that is not in compliance with the requirements of any portion of paragraph (b) or (c) of Rule 10A-3. In this regard, the NYSE Corporate Governance Proposal and the Nasdaq Independent Director Proposal will promote independent and objective review and oversight of an issuer's financial reporting practices.

³⁷⁰ See also *supra* notes 14, 18-19, 22-24, 28.

³⁷¹ 15 U.S.C. 78f(b). In approving the NYSE Corporate Governance Proposal, the Commission has considered the proposed rules' impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

³⁷² 15 U.S.C. 78f(b)(5).

³⁷³ In approving the Nasdaq Independent Director Proposal, the Nasdaq Going Concern Proposal, the Nasdaq Related Party Transactions Proposal, the Nasdaq Issuer Applicability Proposal, and the Nasdaq Code of Conduct Proposal the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

³⁷⁴ 15 U.S.C. 78o-3.

³⁷⁵ 15 U.S.C. 78o-3(b)(6).

³⁷⁶ See *supra* note.

The Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets. The Commission believes that, with these proposals, NYSE and Nasdaq have made significant strides in strengthening their corporate governance listing standards. The Commission notes that many commenters generally supported the NYSE's and Nasdaq's initiatives, although some commenters offered suggestions to clarify, improve, or reconcile various provisions of the proposals. Accordingly, NYSE and Nasdaq amended their proposals to respond to specific issues raised by the commenters; and to harmonize their respective rule proposals in certain areas. The Commission discusses below significant aspects of the NYSE and Nasdaq corporate governance proposals.

Definition of "Independent Director" and Composition of Board of Directors

Both NYSE and Nasdaq propose to require listed issuers to have a majority of independent directors on their boards; require the boards of listed issuers to make an affirmative determination of independence and provide information to investors about their determinations; and identify certain relationships that automatically preclude a board finding of independence.

A number of commenters supported these rule amendments, although a few commenters voiced their objections. The Commission believes that requiring boards to have a majority of independent directors should increase the likelihood that boards will make decisions in the best interests of shareholders. The Commission further believes that requiring boards to make an affirmative determination of independence, and to disclose these determinations, will increase the accountability of boards to shareholders and give shareholders the ability to evaluate the quality of a board's independence and its independence determinations.

The Commission also believes that, by tightening the definition of "independent director," the NYSE and Nasdaq rule revisions appropriately prohibit many relationships that otherwise could impair the independence of directors, such as employment, business, financial, and family relationships. The Commission believes that the listing standards as proposed by the NYSE and Nasdaq provide objective and clear guidance for evaluating a director's independence.

Accordingly, these new listing standards will establish criteria for independence that can be consistently and fairly applied by companies. The Commission also notes that, in addition to incorporating specific factors that preclude a director from being considered independent, the NYSE and Nasdaq provisions require a board to further exercise appropriate discretion to identify any additional material relationship that the director may have with the listed issuer that could interfere with the director's ability to exercise independent judgment.

The Commission also believes that requiring an issuer to disclose in its annual proxy (or annual report on Form 10-K for an issuer that does not file a proxy) its determination regarding those directors it has deemed to be independent will provide greater transparency to the governance process. In addition, the Commission believes it is appropriate for NYSE to require that non-management directors meet at regularly scheduled executive sessions, and for Nasdaq to impose a similar requirement with respect to independent directors meeting in regularly-scheduled executive sessions.

The Commission notes that the NYSE and Nasdaq amended their proposals regarding the independence of directors to respond to concerns or suggestions raised by the commenters or to harmonize more closely various provisions of their proposals to reduce the possibility of differing regulatory treatment. In this regard, the NYSE tightened the definition of "independent director" to state that an employee of the company (or an individual whose immediate family member is an executive officer) is not independent until a specified period after the end of such employment relationship, which is similar to a provision that was proposed by Nasdaq. The NYSE also revised language of the NYSE Business Relationship Proposal by adding language to indicate that the term "company" included parents and subsidiaries. As a result of these changes, the NYSE and Nasdaq provisions are more closely aligned.

In addition, the NYSE revised its provision regarding a director or immediate family member's receipt of \$100,000 in direct compensation from a rebuttable presumption to a bright-line test, which aligns this provision more closely with the test proposed by Nasdaq. The NYSE also amended the length of its look-back periods from five years to three years and revised the phase-in of its look-back proposal so that the full three-year look-back period would be implemented one year after

the Commission's approval of the proposed rule change. As a result of the revisions to the look-back periods, the NYSE narrowed differences in how the NYSE and Nasdaq rules would be applied. Similar to Nasdaq's proposal, the NYSE added a presumption of financial expertise for directors who satisfy the definition of audit committee financial expert set out in Item 401(h) of Regulation S-K.

The Commission notes that Nasdaq also has revised the Nasdaq Independent Director Proposal to take into account the concerns or suggestions of commenters and to bring its proposal into greater harmony with the NYSE Corporate Governance Proposal. In response to commenters' concerns about the clarity of the Nasdaq Independent Director Proposal, Nasdaq set forth more clearly how the terms "subsidiary," and "executive officer" would be defined; indicated that the three-year look-back would apply to relationships that existed at any time within the three-year period; and noted that an independent director who serves on the boards of both a holding company and a subsidiary would not be considered an affiliate of either entity merely as a result of such service. Nasdaq also revised the Nasdaq Independent Director Proposal to provide that loans permitted by section 13(k) of the Exchange Act and compensation for service on board committees were permissible payments. Nasdaq also has extended certain prohibitions to the family members of directors under the amended definition. For example, a director would not be considered independent if a family member of a director is a controlling shareholder or executive officer of any organization to which the company made or from which the company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year or \$200,000, whichever is more. In addition, Nasdaq expanded the scope of relationships with the company's outside auditor that would preclude a finding of independence. A director would not be considered independent if he or she is a partner of the company's outside audit firm or if one of his or her family members is a partner of the outside audit firm. Finally, Nasdaq narrowed the definition of "Family Member" and required the issuer to disclose those directors that it has determined to be independent; both of these changes conform the Nasdaq and NYSE proposals more closely.

Nomination of Directors

The NYSE Corporate Governance Proposal requires each issuer to have a nominating committee that is comprised entirely of independent directors, while the Nasdaq Independent Director Proposal would require the issuer's director nominees to be selected or recommended for the board's selection by a majority of the independent directors or by a nominating committee comprised solely of independent directors. In addition, the NYSE proposal requires that the nominating committee have a written charter that addresses the committee's purpose and responsibilities and an annual performance evaluation of the committee; the Nasdaq proposal requires each issuer to certify that it has adopted a formal written charter or a board resolution addressing the nominations process and such related matters as may be required under the Federal securities laws. With Nasdaq's addition of the written charter requirement, the NYSE and Nasdaq nominating committee proposals are more closely aligned. The commenters who provided their views on independent nominating committees generally supported the NYSE and Nasdaq proposals, although a few of them suggested revisions.

The Commission believes that directors that are independent of management are more likely to support the nomination of qualified, independent directors, and that a written document governing the nominating committee is beneficial in that it would describe the process used to identify board candidates and the criteria for selecting or recommending those candidates. Therefore, the Commission believes that the NYSE and Nasdaq nominating committee provisions are appropriate. In the Commission's view, the NYSE and Nasdaq proposals relating to the definition of "independent director" are a reasonable approach to enable a listed issuer to ascertain whether an individual is truly independent of the issuer. Moreover, the NYSE and Nasdaq proposals requiring a majority of the board to be independent should help to serve shareholders' interests by assuring that key decisions are considered by a board comprised of a majority of individuals without relationships to the issuer that otherwise could impair their judgment.

Compensation of Officers

The NYSE Compensation Committee Provision requires each issuer to have a compensation committee composed

entirely of independent directors that, either as a committee or together with the other independent directors, determines and approves the CEO's compensation, and that makes recommendations to the board with respect to non-CEO compensation. The committee is required to have a written charter addressing the committee's purpose and responsibilities. The Nasdaq Compensation of Executives Provision requires the compensation of the CEO and other executive officers of an issuer to be determined or recommended to the board for determination either by a majority of independent directors or by a compensation committee comprised solely of independent directors. The Nasdaq proposal stipulates that the CEO may not be present during voting or deliberations on the CEO's compensation. In addition, if the committee has at least three members, the Nasdaq proposal permits one director who is not independent and is not a current officer or employee or Family Member of such person to be appointed to the committee for a limited term if the board, under exceptional and limited circumstances, determines that such individual's membership is required and discloses the nature of the relationship and the reasons for the determination.

A number of commenters disapproved of the NYSE's original proposal because it would have given the compensation committee the sole authority to determine CEO compensation. The Commission notes that, in response to these comments, NYSE revised its proposal to state that the committee's responsibility is to determine and approve the CEO's compensation level either as a committee or together with the other independent directors, and made clear that the revised provision does not preclude discussion of CEO compensation with the board generally. Nasdaq also amended its proposal to clarify that an issuer has the flexibility to empower a compensation committee either to take action itself or to recommend that the board take action.

The Commission believes that directors that are independent of management are more likely to evaluate the performance of the CEO and other officers impartially and to award compensation on an objective basis. The Commission believes that the new standards that NYSE and Nasdaq have proposed with respect to how listed companies determine the compensation of their officers are appropriate.

Audit Committee and Compliance With Rule 10A-3

Both NYSE and Nasdaq proposed to strengthen their listing requirements regarding audit committees. Both require listed issuers to comply with the standards set forth in Rule 10A-3, and both elected to adopt the cure period provided in Rule 10A-3(a)(3) for audit committee members who cease to be independent for reasons outside their reasonable control. Both NYSE and Nasdaq retain the requirement that listed issuers have an audit committee that is comprised of at least three directors. Moreover, audit committee members are required to meet the NYSE's or Nasdaq's respective definitions of independence in addition to the independence requirements of Rule 10A-3. The NYSE proposal also requires a special board determination and disclosure in certain instances if an audit committee member simultaneously serves on the audit committee of more than three public companies. The Nasdaq proposal includes a limited exceptional and limited circumstances exception for its non-Rule 10A-3 independence standards and a cure period for certain audit committee vacancies.

Both the NYSE and Nasdaq proposals retain the current provisions that require each member of the audit committee to meet financial literacy requirements and that at least one audit committee member have increased financial sophistication. Regarding the latter requirement, both proposals provide that a director who qualifies as an audit committee financial expert under Commission rules is presumed to qualify for the increased sophistication requirements.

The NYSE and Nasdaq proposals retain the requirement that the audit committee have a written charter that addresses the committee's purpose and responsibilities, and add that the audit committee's responsibilities under Rule 10A-3 must be included. In addition, the NYSE proposal requires that the audit committee charter address an annual performance evaluation of the audit committee.

As with the NYSE and Nasdaq general independence proposals, a number of commenters supported these rule amendments, while a few voiced their concerns. Several commenters, writing before the NYSE and Nasdaq filed amendments to the proposals, requested that the audit committee proposals be reconciled with Rule 10A-3. Others requested clarification of the proposals.

In the Commission's view, an audit committee comprised of independent

directors is better situated to assess objectively the quality of the issuer's financial disclosure and the adequacy of internal controls than a committee that includes members who are affiliated with management. By increasing the independence and competence of audit committees, the amendments are designed to further greater accountability and to improve the quality of financial disclosure and oversight of the financial reporting process. The Commission believes that vigilant and informed oversight by a strong, effective and independent audit committee should help to counterbalance pressures to misreport results and will impose increased discipline on the process of preparing financial information. Improved oversight may help detect fraudulent financial reporting earlier and perhaps thus deter it or minimize its effects. All of these benefits should promote increased market efficiency due to improved information and investor confidence in the reliability of a company's financial disclosure and system of internal controls.

The Commission notes that the NYSE and Nasdaq proposals enhance audit committee independence by implementing the criteria for independence enumerated in Rule 10A-3. In addition, the NYSE and Nasdaq amendments regarding the definition of "independent director" restrict additional relationships not specified in Rule 10A-3 and contain look-back periods to create a comprehensive overall standard for audit committee member independence. As the Commission noted in its release adopting Rule 10A-3,³⁷⁷ it expected that the definition of independence contained in Rule 10A-3 would build and rely on the enhanced independence definitions that SROs adopt through rulemaking conducted under Commission oversight to significantly improve existing standards of independence for audit committee members and thereby help assure strong, independent audit committees.

In addition, the Commission believes that requiring companies to specify the enhanced audit committee responsibilities in their formal written charters, and to delineate how the committee carries out those responsibilities, will help to assure that the audit committee, management, investors, and the company's auditors recognize the function of the audit committee and the relationship among the parties. Moreover, the NYSE and

Nasdaq proposals explicitly require the audit committee to have the duties and responsibilities specified in Rule 10A-3, including direct responsibility for the appointment, compensation, retention and oversight of the company's outside auditor; the ability to engage outside advisors; the ability to obtain funding for the audit committee and its outside advisors; and the responsibility to establish procedures for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters, including procedures for the confidential, anonymous submission of employee complaints.

The Commission notes that these heightened standards complement existing listing standards adopted by NYSE and Nasdaq as a result of the Blue Ribbon Committee's report and retained under the new proposals. The existing standards include the requirement that each issuer have an audit committee composed of at least three independent directors who are able to read and understand financial statements, thus helping to ensure that the committee as a whole is financially literate. Moreover, one member of the audit committee is required to have additional financial expertise or sophistication, thus further enhancing the effectiveness of the audit committee in carrying out its financial oversight responsibilities.

The Commission notes that the NYSE and Nasdaq amended their proposals regarding audit committees to respond to concerns raised by commenters or to adopt commenters' suggestions. In addition, the NYSE and Nasdaq made a number of revisions to their proposals to conform their original proposals, which were submitted before Commission approval of Rule 10A-3, to the requirements in Rule 10A-3 as adopted by the Commission. Several of the commenters' concerns regarding the original proposals, such as those relating to the prohibition on "affiliate" status for audit committee members, were addressed in the Commission's adoption of Rule 10A-3 and the conforming amendments submitted by NYSE and Nasdaq. In addition, in this regard, Nasdaq removed a provision in its original proposal that would have permitted directors who own or control less than 20% of a company's stock to be audit committee members. The NYSE and Nasdaq also added various clarifications in their rules in response to comment. For example, both proposals state that a person who satisfies the Commission's definition of an audit committee financial expert is presumed to have requisite financial expertise. In addition, the NYSE and

Nasdaq made changes to their proposals to address the rules' application to investment companies.

The Commission believes that the NYSE and Nasdaq proposals regarding audit committees are appropriate and are consistent with section 10A(m)³⁷⁸ of the Exchange Act and Rule 10A-3 thereunder.³⁷⁹

Code of Conduct

Both the NYSE and Nasdaq proposed to require listed issuers to adopt and make publicly available a code of conduct with enforcement provisions applicable to all directors, officer, and employees, and to require any waivers of the code for directors or executive officers to be disclosed. A number of commenters supported these rule amendments, although a few commenters provided suggestions for improving the proposals. The Commission believes that requiring listed issuers to adopt a code of conduct should help to foster the ethical behavior of directors, officers, and employees because directors, officer and employees will know the standards of conduct expected of them in ethically fulfilling the responsibilities of their positions and will be made fully cognizant that their actions will be monitored. The Commission also believes that requiring the code of conduct and any waivers of the code for directors and executive officers to be disclosed will provide shareholders the opportunity to evaluate the quality of a company's code and the ability to scrutinize significant waivers of its provisions.

Applicability to Registered Management Investment Companies, Certain Other Entities, and Foreign Private Issuers

Both the NYSE and Nasdaq proposed to exempt management investment companies that are registered under the Investment Company Act from the new requirements relating to board independence and the role of independent directors in nomination and compensation decisions. The Commission believes that this exemption is reasonable, because the Investment Company Act already assigns important duties of investment company governance, such as approval of the investment advisory contract, to independent directors. Further, many of the Commission's exemptive rules under the Investment Company Act require investment companies relying on those rules to have a majority of independent directors, and require

³⁷⁷ Securities Act Release No. 8220 (April 9, 2003), 68 FR 18788 (April 16, 2003).

³⁷⁸ 15 U.S.C. 78j-1(m).

³⁷⁹ 17 CFR 240.10A-3.

those independent directors to select and nominate other independent directors.

The Commission also notes that registered management investment companies will still be required to comply with the new rules relating to audit committees, consistent with Rule 10A-3. In addition, business development companies will be required to comply with all of the new requirements under both proposals, but will be required to use the "interested person" standard under the Investment Company Act for purposes of determining director independence.

Both NYSE and Nasdaq further proposed to exempt asset-backed issuers and other passive issuers from the new requirements relating to board independence and independent director role in nomination and compensation decisions, as well as from the new requirements relating to audit committees. The Commission believes that such an exemption is reasonable, and notes that such entities are exempt from the requirements of Rule 10A-3.

The Commission further believes that other proposed provisions relating to limited partnerships, companies in bankruptcy, and cooperative entities are reasonable, given the specific characteristics of these entities. The Commission notes that these provisions have been designed for consistency with Rule 10A-3.

The NYSE proposal would permit foreign private issuers to follow home country practice in lieu of the provisions of the new rules, except that such issuers would be required to comply with the requirements relating to audit committees and notification of non-compliance mandated by Rule 10A-3. In addition, foreign private issuers would be required to disclose significant ways in which their corporate governance practices differ from the standards that NYSE requires of domestic companies. The Nasdaq Issuer Applicability Proposal clarifies that Nasdaq's existing authority under its rules to provide exemptions from its corporate governance standards as necessary so that a foreign private issuer is not required to do any act that is contrary to home country laws or business practices does not apply to the extent that it would be contrary to the requirements of Rule 10A-3. Nasdaq would also require a foreign private issuer to disclose each domestic requirement from which it is exempted, and to describe the home country practice, if any, followed by the issuer in lieu of domestic requirements. The Commission believes that granting exemptions to foreign private issuers in

deference to their home country practices—so long as they comply with Rule 10A-3 requirements—is appropriate, and believes that the disclosure requirement will help investors determine whether they are satisfied with the alternate standards.

Nasdaq Going Concern Proposal

Nasdaq proposed to require each listed company that receives an audit opinion that contains a going concern qualification to make a public announcement of such event. No commenters offered their views on this proposal. The Commission believes this requirement will help to bring to the attention of investors and potential investors the receipt of a going concern qualification by a company, which the Commission believes is important information for shareholders.

Nasdaq Related Party Transactions Proposal

Nasdaq proposed to strengthen its current rule addressing the review of related party transactions to provide that all such transactions would not only need to be reviewed for potential conflict of interest situations on an ongoing basis, but that all such transactions would also have to be approved by the listed company's audit committee or another independent body of the board of directors. No comments were received on this proposal. The Commission believes that requiring an independent body of the board of directors to approve all related party transactions should help to protect investors because directors not related to management should be less likely to approve of related party transactions that could be detrimental to the interests of shareholders.

Implementation Dates and Transition Periods

The Commission notes that both NYSE and Nasdaq have amended the compliance dates and the transition periods associated with the new standards relating to director independence, board committees, and notification of non-compliance so that the periods are consistent with the transition period for Rule 10A-3. The Commission believes that this revision will provide for ease of implementation. Accordingly, companies will be expected to begin complying with these new listing standards as of the earlier of their first annual meeting after January 15, 2004 or October 31, 2004, except as otherwise provided in the case of foreign private issuers, small business issuers, and initial public offerings

consistent with Rule 10A-3.³⁸⁰ The Commission further believes that the proposed provisions relating to companies transferring their listing from one market to another are reasonable and appropriate.

VI. Accelerated Approval of NYSE Amendment Nos. 2 and 3, Amendment Nos. 2, 3, 4, and 5 to the Nasdaq Independent Director Proposal, Amendment Nos. 2 and 3 to the Nasdaq Related Party Proposal, Amendment Nos. 1, 2, and 3 to the Nasdaq Issuer Applicability Proposal, and Amendment No. 2 to the Nasdaq Code of Conduct Proposal

The Commission finds good cause for approving NYSE Amendment Nos. 2 and 3, Amendment Nos. 2, 3, 4 and 5 to the Nasdaq Independent Director Proposal, Amendment Nos. 2 and 3 to the Nasdaq Related Party Proposal, Amendment Nos. 1, 2, and 3 to the Nasdaq Issuer Applicability Proposal, and Amendment No. 2 to the Nasdaq Code of Conduct Proposal prior to the thirtieth day after the amendments are published for comment in the **Federal Register** pursuant to section 19(b)(2) of the Exchange Act.

The Commission believes that NYSE Amendment Nos. 2 and 3, Amendment Nos. 2, 3, 4, and 5 to the Nasdaq Independent Director Proposal, and Amendment Nos. 2 and 3 to the Nasdaq Issuer Applicability Proposal address many concerns raised in the comment letters. Other changes provide more guidance regarding certain provisions that needed further clarification or were added to bring greater harmony to the NYSE and Nasdaq proposals. As discussed above, the Commission believes that these proposed rule changes, as amended, are reasonable and appropriate and serve the interests of the investing public. The Commission further believes that accelerating the approval of these amendments will enable NYSE and Nasdaq to put into place a complete and comprehensive set of corporate governance standards for listed companies in time for the 2004 proxy season. In addition, the NYSE and Nasdaq provisions relating to audit committees respond to the mandate of Rule 10A-3, which requires SROs to have such rules in place by December 1, 2003.

³⁸⁰ The Nasdaq Going Concern Proposal, however, is effective immediately upon adoption, and issuers will be required to comply with the Nasdaq Code of Conduct Proposal six months from the date of Commission approval. In addition, foreign issuers will be required to disclose receipt of a corporate governance exemption from Nasdaq for new filings and listings made after January 1, 2004.

In Amendment No. 2 to the Nasdaq Related Party Proposal, Nasdaq proposes to restore language that was deleted in the original proposal that clarifies that an issuer's review of all related party transactions must be for potential conflict of interest situations.³⁸¹ The Commission believes that these changes clarify the application of the proposal, and do not raise any new issues. In Amendment No. 3 to the Nasdaq Related Party Proposal, Nasdaq proposes that the Related Party Proposal become effective on January 15, 2004, in order to minimize disruption to existing issuer audit committees.³⁸² The Commission believes that this change will ease implementation of the rule.

In Amendment No. 2 to the Nasdaq Code of Conduct Proposal, Nasdaq proposes to renumber the paragraph in NASD Rule 4350(n) containing its provisions, add a cross-reference to the definition of a code of ethics promulgated under the Sarbanes-Oxley Act, and to require any waivers of a code of conduct to be disclosed in a Form 8-K within five days.³⁸³ The Commission believes that the amendment clarifies the application of the proposal, provides a specific manner in which the disclosure requirement must be fulfilled, and does not raise any new issues.

The Commission therefore believes that accelerated approval of NYSE Amendment Nos. 2 and 3, Amendment Nos. 2, 3, 4, and 5 to the Nasdaq Independent Director Proposal, Amendment Nos. 2 and 3 to the Nasdaq Related Party Proposal, Amendment Nos. 1, 2, and 3 to the Nasdaq Issuer Applicability Proposal, and Amendment No. 2 to the Nasdaq Code of Conduct Proposal is appropriate. Based on the above, the Commission finds, consistent with sections 6(b)(5)³⁸⁴ and 19(b)³⁸⁵ of the Exchange Act, that good cause exists to accelerate approval of NYSE Amendment Nos. 2 and 3; and, consistent with sections 15A(b)(6)³⁸⁶ and 19(b) of the Exchange Act, that good cause exists to accelerate approval of Amendment Nos. 2, 3, 4, and 5 to the Nasdaq Independent Director Proposal, Amendment Nos. 2 and 3 to the Nasdaq Related Party Proposal, Amendment Nos. 1, 2, and 3 to the Nasdaq Issuer Applicability Proposal, and Amendment

No. 2 to the Nasdaq Code of Conduct Proposal.

VII. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning NYSE Amendment Nos. 2 and 3, Amendment Nos. 2, 3, 4, and 5 to the Nasdaq Independent Director Proposal, Amendment Nos. 2 and 3 to the Nasdaq Related Party Proposal, Amendment Nos. 1, 2, and 3 to the Nasdaq Issuer Applicability Proposal, and Amendment No. 2 to the Nasdaq Code of Conduct Proposal, including whether these amendments are consistent with the Exchange Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal offices of the NYSE and Nasdaq. All submissions should refer to File No. SR-NYSE-2002-33, SR-NASD 2002-141, SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138 and SR-NASD-2002-139, and should be submitted by December 3, 2003.

VIII. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, SR-NYSE-2002-33, as amended, is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with section 6(b)(5) of the Exchange Act³⁸⁷; and that the proposed rule changes, SR-NASD 2002-141, as amended; SR-NASD-2002-77; SR-NASD-2002-80, as amended; SR-NASD-2002-138, as amended; and SR-NASD-2002-139, as amended, are consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities association, and, in particular, with section 15A(b)(6) of the Exchange Act.³⁸⁸

It is therefore ordered, pursuant to section 19(b)(2) of the Exchange Act,³⁸⁹ that the proposed rule changes, SR-NYSE-2002-33, as amended; SR-NASD 2002-141, as amended; SR-NASD-2002-77; SR-NASD-2002-80, as amended; SR-NASD-2002-138, as amended; and SR-NASD-2002-139, as amended, are approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.³⁹⁰

Jill M. Peterson,
Assistant Secretary.

Exhibit A

Comment Letters Relating to SR-NYSE-2002-33, the NYSE Corporate Governance Proposal

1. Letter from Timothy J. Adams, General Counsel, Labor Ready, Inc., to Jonathan G. Katz, Office of the Secretary, Commission, dated August 22, 2002 ("Labor Ready NYSE Letter").

2. Letter from Timothy Smith, Senior Vice President, Walden Asset Management, to Mr. Harvey Pitt, Chairman, Commission, dated August 23, 2002 ("Walden NYSE Letter").

3. Letter from Frank Curtis, Special Projects Officer, Railways Pension Trustee Company Limited, to Mr. H Pitt, Chairman, Commission, dated July 31, 2002 ("Railways Pension NYSE Letter").

4. Letter from Timothy H. Smith, President, and Alisa Gravitz, Vice President, Social Investment Forum, to Mr. Harvey L. Pitt, Commission, dated August 6, 2002 ("Social Investment NYSE Letter").

5. Letter from Douglas H. Philipsen, Chairman, President and Chief Executive Officer, Independent Bank Corp., to Mr. Hardwick Simmons, Chairman and Chief Executive Officer, Nasdaq, dated August 26, 2002 ("Independent Bank Corp NYSE Letter").

7. Letter from Thomas F. Ray, Brookstreet Securities, to Mr. Harvey L. Pitt, Chairman, Commission, dated September 10, 2002 ("Brookstreet Securities NYSE Letter").

8. Letter from Valerie Heinonen, o.s.u., Consultant, Corporate Social Responsibility, Ursuline Sisters of Tildonk "U.S. Province, to Harvey Pitt, Chair, Commission, dated August 27, 2002 ("Ursuline Sisters NYSE Letter").

9. Letter from David M. Dobkin, CFP, First Affirmative Financial Network, Cambridge Investment Research, Inc. to Mr. Harvey L. Pitt, Chairman, Commission, dated September 6, 2002 ("Dobkin NYSE Letter").

10. Letter from Robert Walker, Vice President, SRI Policy and Research, Ethical Funds Inc., to Mr. Harvey L. Pitt, Chairman, Ms. Cynthia A. Glassman, Commissioner, Mr. Harvey J. Goldschmid, Commissioner, Mr. Roel C. Campos, Commissioner, Mr. Paul S. Atkins, Commissioner, Commission, dated September 6, 2002 ("Ethical Funds NYSE Letter").

11. Letter from Alastair Ross Goobey, Chairman of the Board, International

³⁸¹ See Amendment No. 2 to the Nasdaq Related Party Proposal.

³⁸² See Amendment No. 3 to the Nasdaq Related Party Proposal.

³⁸³ See Amendment No. 2 to the Nasdaq Code of Conduct Proposal.

³⁸⁴ 15 U.S.C. 78f(b)(5).

³⁸⁵ 15 U.S.C. 78s(b).

³⁸⁶ 15 U.S.C. 78o-3(b)(6).

³⁸⁷ 15 U.S.C. 78f(b)(5).

³⁸⁸ 15 U.S.C. 78o-3(b)(6).

³⁸⁹ 15 U.S.C. 78s(b)(2).

³⁹⁰ 17 CFR 200.30-3(a)(12).

Corporate Governance Network, to Mr. Harvey Pitt, Chairman, Commission, dated August 16, 2002 ("International Corporate Governance NYSE Letter").

12. Letter from Sarah A.B. Teslik, Executive Director, Council of Institutional Investors, to Harvey L. Pitt, Chairman, Commission, dated August 1, 2002 ("Council of Institutional Investors NYSE Letter").

13. Letter from Linda Selbach, Barclays Global Investors, to Mr. James Cochrane, Senior Vice President, Strategy and Planning, NYSE, dated July 18, 2002 ("Barclays NYSE Letter").

14. E-mail from Walter J. Coleman, dated May 2, 2003 ("Coleman NYSE E-mail").

15. Letter from David A. Nadler, Ph.D., Mercer Delta Consulting, to Mr. Jonathan Katz, Secretary, Commission, dated November 20, 2002 ("Mercer Delta NYSE Letter").

16. Letter from Roger M. Kenny, Managing Partner, Boardroom Consultants, to Mr. Jonathan Katz, Secretary, Commission, dated December 6, 2002 ("Boardroom Consultants NYSE Letter").

17. Letter from Robert H. Cohen, Esq., Morrison Cohen Singer & Weinstein, LLP, to Commission, Attention Jonathan Katz, Secretary, dated December 17, 2002 ("Morrison Cohen NYSE Letter").

18. Memo from Wachtell, Lipton, Rosen & Katz, Financial Institutions Developments, Solving The Proposed Director Independence Standards for Bank Holding Company Directors, by Edward D. Herlihy, Craig M. Wasserman, Richard K. Kim, Lawrence S. Makow, and Nicholas G. Demmo, dated February 10, 2003 ("Wachtell NYSE Memo").

19. Letter from Jay W. Lorsch, to Ms. Janice O'Neill, Vice President, Corporate Governance, NYSE, dated May 5, 2003 ("Lorsch NYSE Letter").

20. Letter from Leon J. Level, Chief Financial Officer, Computer Sciences Corporation, to Jonathan G. Katz, Secretary, Commission, dated May 5, 2003 ("Computer Sciences NYSE Letter").

21. Letter from Eberhard G. H. Schmoller, Senior Vice President and General Counsel, CNF Inc., to Jonathan G. Katz, Secretary, Commission, dated May 5, 2003 ("CNF NYSE Letter").

22. Letter from William J. Casazza, Vice President, Deputy General Counsel and Corporate Secretary, Aetna, to Jonathan G. Katz, dated May 6, 2003 ("Aetna NYSE Letter").

23. Letter from Stuart A. Sheldon, Dow, Lohnes & Albertson, PLLC, to Jonathan G. Katz, Secretary, Commission, dated May 7, 2003 ("Dow Lohnes NYSE Letter").

24. Letter from Thomas E. Rutledge, Ogden Newell & Welch PLLC, to Jonathan G. Katz, Secretary, Commission, dated May 1, 2003 ("Ogden Newell NYSE Letter").

25. Letter from Brian Krolicki, President, National Association of State Treasurers, to Jonathan G. Katz, Secretary, Commission, dated May 2, 2003 ("National Association of State Treasurers NYSE Letter").

26. Letter from Evelyn Cruz Sroufe, Perkins Coie LLP, to Jonathan G. Katz, Secretary, Commission, dated May 5, 2003 ("Perkins Coie NYSE Letter").

27. Letter from C.W. Mueller, Chairman and CEO, Ameren Corporation, to Jonathan

G. Katz, Secretary, Commission, dated May 5, 2003 ("Ameren NYSE Letter").

28. Letter from Naohiko Matsuo, Director for International Financial Markets, Financial Services Agency, Government of Japan, to Jonathan G. Katz, Secretary, Commission, dated May 8, 2003 ("Financial Services Agency NYSE Letter").

29. Letter from Craig S. Tyle, General Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, Commission, dated May 8, 2003 ("Investment Company Institute NYSE Letter").

30. Letter from Stacy L. Fox, Senior Vice President, General Counsel and Secretary, Visteon Corporation, to Jonathan G. Katz, Secretary, Commission, dated May 6, 2003 ("Visteon NYSE Letter").

31. Letter from Simon B. Halfin, Counsel, Peoples Energy Corporation, to Jonathan G. Katz, Secretary, Commission, dated May 7, 2003 ("Peoples Energy NYSE Letter").

32. Letter from Patrick T. Mulva, Vice President, Investor Relations and Secretary, Exxon Mobil Corporation, to Jonathan G. Katz, Secretary, Commission, dated May 7, 2003 ("Exxon NYSE Letter").

33. Letter from Robert S. Singley, Vice President and Assistant Secretary, Wells Fargo & Company, to Secretary, Commission, dated May 7, 2003 ("Wells Fargo NYSE Letter").

34. Letter from Ned Barnholt, Chairman, President and CEO, Agilent Technologies, to Secretary, Commission, dated May 7, 2003 ("Agilent NYSE Letter").

35. Letter from Peter C. Clapman, Senior Vice President and Chief Counsel, Corporate Governance, TIAA-CREF, to Jonathan G. Katz, Secretary, Commission, dated May 6, 2003 ("TIAA-CREF NYSE Letter").

36. Letter from Charlotte M. Bahin, Senior Vice President, Regulatory Affairs, America's Community Bankers, to Jonathan G. Katz, Secretary, Commission, dated May 8, 2003 ("America's Community Bankers NYSE Letter").

37. Letter from Janne G. Gallagher, Vice President General Counsel, Council on Foundations, to Jonathan G. Katz, Secretary, Commission, dated May 8, 2003 ("Council on Foundations NYSE Letter").

38. Letter from Gregory E. Lau, Executive Director Global Compensation and Corporate Governance, General Motors Corporation, to Secretary, Commission, dated May 8, 2003 ("General Motors NYSE Letter").

39. Letter from Gerald S. Backman, Chairman of the Committee, New York State Bar Association, Business Law Section, Committee on Securities Regulation, to Commission, dated May 8, 2003 ("New York State Bar NYSE Letter").

40. Letter from Mark G. Heesen, President, National Venture Capital Association, to Jonathan G. Katz, Secretary, Commission, dated May 8, 2003 ("National Venture NYSE Letter").

41. Letter from KPMG LLP, to Jonathan G. Katz, Secretary, Commission, dated May 8, 2003 ("KPMG NYSE Letter").

42. Letter from Winston & Strawn, to Jonathan G. Katz, Secretary, Commission, dated May 7, 2003 ("Winston & Strawn NYSE Letter").

43. Letter from Gregory F. Pilcher, Senior Vice President, General Counsel and

Corporate Secretary, Kerr-McGee Corporation, to Secretary, Commission, dated May 7, 2003 ("Kerr-McGee NYSE Letter").

44. Letter from C.R. Cloutier, Chairman, Independent Community Bankers of America, to Jonathan G. Katz, Secretary, Commission, dated May 8, 2003 ("Independent Community Bankers NYSE Letter").

45. Letter from James P. Melican, Executive Vice President, International Paper Company, to Jonathan G. Katz, Secretary, Commission, dated May 8, 2003 ("International Paper NYSE Letter").

46. Letter from LeBoeuf, Lamb Greene & MacRae, L.L.P., to Jonathan G. Katz, Secretary, Commission, dated May 8, 2003 ("LeBoeuf NYSE Letter").

47. Letter from Suzanne Suter, Vice President, Corporate Secretary and Chief Governance Officer, Anadarko Petroleum Corporation, to Jonathan G. Katz, Secretary, Commission, dated May 8, 2003 ("Anadarko NYSE Letter").

48. Letter from Cleary, Gottlieb, Steen & Hamilton, to Jonathan G. Katz, Secretary, Commission, dated May 16, 2003 ("Cleary NYSE Letter").

49. Letter from Kathleen M. Gibson, Chairman, Taskforce on Corporate Accountability, American Society of Corporate Secretaries, to Jonathan Katz, Secretary, Commission, dated May 10, 2003 ("American Society of Corporate Secretaries NYSE Letter").

50. Letter from Charles M. Nathan, Committee on Securities Regulation of the Association of the Bar of the City of New York, to Secretary, Commission, dated May 9, 2003 ("Committee on Securities Regulation NYSE Letter").

51. Letter from Elizabeth B. Chandler, Vice President, Assistant General Counsel and Corporate Secretary, Mirant Corporation, to Jonathan G. Katz, Secretary, Commission, dated May 15, 2003 ("Mirant NYSE Letter").

52. Letter from Franklin D. Raines, Chairman and CEO, Fannie Mae, Chairman—Corporate Governance Task Force, The Business Roundtable, to Jonathan G. Katz, Secretary, Commission, dated May 15, 2003 ("Business Roundtable NYSE Letter").

53. Letter from William J. Calise, Jr., Rockwell Automation, Inc., to Mr. Jonathan G. Katz, Secretary, Commission, dated May 21, 2003 ("Rockwell NYSE Letter").

54. Letter from Melvin A. Eisenberg, Koret Professor of Law, University of California School of Law (Boalt Law), to Secretary, Commission, dated June 16, 2003, ("Eisenberg NYSE Letter").

55. Letter from Sarah A. Miller, American Bankers Association, to Jonathan G. Katz, Secretary, Commission, dated June 27, 2003 ("American Bankers Association NYSE Letter").

56. Letter from Deborah S. Lamb, Chair, U.S. Advocacy Committee of the Association for Investment Management and Research and Linda L. Rittenhouse, Staff, AIMR Advocacy, Association for Investment Management and Research, to Mr. Jonathan G. Katz, Secretary, Commission, dated July 2, 2003 ("AIMR Advocacy Letter").

57. Letter from Eugene Ellman, Executive Director, Social Investment Organization, to

Mr. Harvey L. Pitt, Chairman, Commission, dated September 13, 2002 ("SIO NYSE Letter").

58. E-mail from Tore U. Johnsson, to *rule-comments@sec.gov* dated August 23, 2002 ("Johnsson E-mail").

59. E-mail from Mark@mvcinternational.com dated September 4, 2003 ("MVC Associates NYSE E-mail").

60. Letter from Sullivan & Cromwell, to Mr. Jonathan G. Katz, Secretary, Commission, dated September 23, 2003 ("Sullivan & Cromwell NYSE Letter").

61. Letter from Henry A. McKinnell, Chairman of the Board and Chief Executive Officer, Pfizer Inc., to Mr. Richard Grasso, Chairman, NYSE, dated May 30, 2003 ("Pfizer NYSE Letter").

62. Letter from Barbara J. Krumsiek, President and CEO, Calvert Group, Ltd., to Mr. Richard A. Grasso, Chairman and Chief Executive Officer, NYSE, dated May 20, 2003 ("Calvert Letter").

63. Letter from Bob Reed, JP Financial, to Janice ("Bob Reed Letter").

Comment Letters Relating to SR-NASD-2002-141, the Nasdaq Independent Director Proposal

1. Letter from D. Scott Huggins, Senior Vice President and Chief Auditor, Fulton Financial Corporation, to Jonathan G. Katz, Secretary, Commission, dated April 1, 2003 ("Fulton Nasdaq Letter").

2. Letter from Joseph S. Schwartz Jr., Corporate Secretary, Whitney Holding Company, to Jonathan G. Katz, Secretary, Commission, dated April 14, 2003 ("Whitney Nasdaq Letter").

3. Letter from Janne G. Gallagher, Acting General Counsel, Council on Foundations, to Jonathan G. Katz, Secretary, Commission, dated April 15, 2003 ("Council on Foundations Nasdaq Letter").

4. Letter from Cary Klafter, Vice President, Legal and Government Affairs, Intel Corporation, to Margaret H. McFarland, Deputy Secretary, Commission, dated April 11, 2003 ("Intel Nasdaq Letter").

5. Letter from Susan D. Stanley, First Vice President and Corporate Secretary, People's Bank, to Jonathan G. Katz, Secretary, Commission, dated April 15, 2003 ("People's Bank Nasdaq Letter").

6. Letter from Charlotte M. Bahin, Director of Regulatory Affairs, Senior Regulatory Counsel, America's Community Bankers, to Jonathan G. Katz, Secretary, Commission, dated April 22, 2003 ("America's Community Bankers Nasdaq Letter").

7. Letter from Sarah A. Miller, Director, Center for Securities, Trust and Investments, American Bankers Association, to Jonathan G. Katz, Secretary, Commission, dated April 16, 2003 ("American Bankers Association Nasdaq Letter").

8. Letter from Craig S. Tyle, General Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, Commission, dated April 15, 2003 ("Investment Company Institute Nasdaq Letter").

9. Letter from David A. Kastelic, Senior Vice President and General Counsel, Cenex Harvest States Cooperatives, to Jonathan G. Katz, Secretary, Commission, dated April 21, 2003 ("Cenex Harvest Nasdaq Letter").

10. Letter from Charles M. Nathan, Committee on Securities Regulation of the Association of the Bar of the City of New York, to Secretary, Commission, dated April 25, 2003 ("Committee on Securities Regulation Nasdaq Letter").

11. Letter from C.R. Cloutier, Chairman, Independent Community Bankers of America, to Jonathan G. Katz, Secretary, Commission, dated May 6, 2003 ("Independent Community Bankers Nasdaq Letter").

12. Letter from Douglas A. Cifu, Paul, Weiss, Rifiand, Wharton & Garrison LLP, to Jonathan G. Katz, Secretary, Commission, dated May 14, 2003 ("Paul Weiss Nasdaq Letter").

13. Letter from Mark G. Heesen, President, National Venture Capital Association, to Jonathan G. Katz, Secretary, Commission, dated April 16, 2003 ("National Venture Nasdaq Letter").

14. Letter from Fritz Heimann, Chairman, and Thomas L. Milan, Director, Transparency International-USA, to Mr. Jonathan G. Katz, Secretary, Securities and Exchange Commission, dated May 28, 2003 ("TI-USA Nasdaq Letter").

15. Letter from Bonnie K. Wachtel, CEO, Wachtel & Co., Inc., to Jonathan G. Katz, Secretary, Commission, dated June 16, 2003 ("Wachtel Nasdaq Letter").

16. Letter from Irwin M. Jacobs, Chairman and CEO, QUALCOMM, to Secretary, Commission, dated August 22, 2002 ("Qualcomm Nasdaq Letter").

17. E-mail from Tore U. Johnsson, to *rule-comments@sec.gov* dated August 23, 2002 ("Johnsson Nasdaq E-mail").

18. E-mail from George Kolber to *rule-comments@sec.gov*, dated July 1, 2003 ("Kolber Nasdaq E-mail").

19. Letter from Gary P. Kreider, Keating, Muething & Klekamp, PLL, to Secretary, Commission, dated July 1, 2003 ("Kreider Nasdaq Letter").

Comment Letters Relating to Both SR-NYSE-2002-33 and SR-NASD-2002-141

1. Letter from Stanley Keller, Chair, Committee on Federal Regulation of Securities, Robert Todd Lang, Chair, Task Force on Listing Standards, Committee on Federal Regulation of Securities, American Bar Association, Business Law Section, to Commission, dated June 2, 2003 ("Committee on Federal Regulation of Securities Letter").

2. E-mail from Peter Herman dated June 3, 2003 ("Herman E-mail").

3. E-mail from HarlanHobgood@cs.com to *rule-comments@sec.gov*, dated June 12, 2003 ("Hobgood E-mail").

4. Letter from Mark R. Beatty, General Counsel, Cascade Investment, to The Honorable Jonathan G. Katz, Secretary, Commission, dated July 3, 2003 ("Cascade Investment Letter").

5. Letter from Peter S. Brown, Senior Vice President and General Counsel, Arrow Electronics, Inc., to Ms. Janice O'Neill, Vice President of Corporate Compliance, NYSE, dated August 28, 2003 ("Arrow Electronics Letter").

Comment Letters Relating to SR-NASD-2002-139, the Nasdaq Code of Conduct Proposal

1. Letter from Dorothy M. Donohue, Associate Counsel, Investment Company Institute, to Mr. Jonathan G. Katz, Secretary, Commission, dated July 30, 2003 ("ICI 2002-139 Letter").

2. Letter from Charlotte M. Bahin, Senior Vice President, Regulatory Affairs, America's Community Bankers, to Jonathan G. Katz, Secretary, Commission, dated July 31, 2003 ("ACB 2002-139 Letter").

Comment Letters Relating to SR-NASD-2002-138, the Nasdaq Issuer Applicability Proposal

1. Letter from Sullivan & Cromwell LLP, to Mr. Jonathan G. Katz, Secretary, Commission, dated July 31, 2003 ("S&C 2002-138 Letter").

[FR Doc. 03-28187 Filed 11-10-03; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48746; File No. SR-PCX-2003-32]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Exchange, Inc. Relating to the Exchange's Rules Under the Minor Rule Plan

November 4, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 8, 2003, the Pacific Exchange, Inc. ("PCX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PCX is proposing to adopt new PCX Rules 10.13(h)(40)-(44) and 10.13(k)(i)(40)-(44) in order to incorporate five existing PCX rules into the Minor Rule Plan ("MRP") and Recommended Fine Schedule ("RFS"). The five PCX Rules include: (1) Failure to honor priority of bids and offers pursuant to PCX Rules 6.75 and 6.76; (2) failure to quote markets within the maximum quote spread differentials or failure to disseminate quotations accurately pursuant to PCX Rules

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

6.37(b)(1) and 6.82(c)(1); (3) trading either before the opening or after closing of market pursuant to PCX Rule 4.2; (4) entering two-sided quotations in options issues that are not included in a Remote Market Maker's ("RMM") primary appointment pursuant to PCX Rule 6.37(h)(5); and (5) failure to maintain an accurate record of orders pursuant to PCX Rule 6.68. The Exchange is also proposing three minor amendments to the MRP and RFS. The text of the proposed rule change is below. Proposed new language is *italicized*; proposed deletions are in brackets.

* * * * *

Minor Rule Plan

Rule 10.13(a)-(g)—No change.

(h) Minor Rule Plan: Options Floor Decorum and Minor Trading Rule Violations

(1)-(24)—No change.

(25) Failure to meet 75% Primary Appointment [Zone] Requirement. (Rules 6.35, Com. .03 and 6.37(h)(5))

(26)-(32)—No change.

(33) Dividing up an order to make its parts eligible for entry into Auto-Ex or PCX Plus. (Rules 6.87(2)(c)) and 6.90(e)(1)).

(34)-(39)—No change.

(40) Member failed to honor the priority of bids and offers. (Rules 6.75 and 6.76)

(41) Market Maker failed to quote markets within the maximum quote spread differentials or failed to disseminate quotes accurately. (Rules 6.37(b)(1) and 6.82(c)(1))

(42) Member traded either before the opening or after the close of market. (Rule 4.2)

(43) Remote Market Maker entered two-sided quotations in options issues that are not included in their primary appointments. (Rule 6.37(h)(5))

(44) Member failed to maintain an accurate record of orders. (Rule 6.68)

(i)—No change.

(j)—No change.

(k) Minor Rule Plan: Recommended Fine Schedule

(i) Options Floor Decorum and Minor Trading Rule Violation

1.-24.—No change.

1. Failure to meet 75% Primary Appointment [Zone] Requirement. (Rules 6.35, Com. .03 and 6.37(h)(5))

26-32.—No change.

33. Dividing up an order to make its parts eligible for entry into Auto-Ex or PCX Plus. (Rules 6.87(d)(2)(c)) and 6.90(e)(1))

34.-38.—No change.

1. Failure to meet 60% Quoting Requirement. (Rule 6.37(g)(2))

1st Violation, \$500.

2nd Violation, \$1,000.

3rd Violation, \$2,500.

2. Member failed to honor the priority of bids and offers. (Rules 6.75 and 6.76)

1st Violation, \$500.

2nd Violation, \$1,000.

3rd Violation, \$2,000.

3. Market Maker failed to quote markets within the maximum quote spread differentials or failed to disseminate quotes accurately. (Rules 6.37(b)(1) and 6.82(c)(1))

1st Violation, \$500.

2nd Violation, \$1,000.

3rd Violation, \$2,000.

4. Member traded either before the opening of Market or after the close of market. (Rule 4.2)

1st Violation, \$1,000.

2nd Violation, \$2,500.

3rd Violation, \$3,500.

43. Remote Market Maker entered two-sided quotations in options issues that are not included in their primary appointments. (Rule 6.37(h)(5))

1st Violation, \$500.

2nd Violation, \$1,000.

3rd Violation, \$2,500.

44. Member failed to maintain accurate record of orders. (Rule 6.68)

1st Violation, \$500.

2nd Violation, \$1,000.

3rd Violation, \$2,500.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the PCX included statements concerning the purpose of and basis for the proposed rule change, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

I. Purpose

The Exchange proposes to adopt new PCX Rules 10.13(h)(40)-(44) and 10.13(k)(i)(40)-(44) in order to incorporate existing PCX Rules 6.75 and 6.76, 6.37(b)(1) and 6.82(c)(1), 4.2, 6.37(h)(5), and 6.68 into the MRP and RFS.

First, the Exchange proposes to adopt new PCX Rules 10.13(h)(40) and 10.13(k)(i)(40) into the MRP and RFS for failure to honor the priority of bids and offers pursuant to PCX Rules 6.75 and

6.76.³ PCX Rule 6.75 states that the highest bid/offer shall have priority, but where two or more bids/offers for the same option contract represent the highest price and one bid/offer is displayed by the Order Book Official, such bid/offer shall have priority over any other bid/offer at the post. Similarly, under PCX Rule 6.76, multiple bids or offers are afforded priority based on account types and other principles. The proposed fines are \$500 for a first violation, \$1,000 for a second, and \$2,000 for a third.

Second, the Exchange proposes to adopt new PCX Rules 10.13(h)(41) and 10.13(k)(i)(41) into the MRP and RFS for failure to quote markets within the maximum quote spread differentials pursuant to PCX Rule 6.37(b)(1) or failure to disseminate quotations accurately pursuant to 6.82(c)(1). PCX Rule 6.37(b)(1) states that a Market Maker is expected to bid/offer so as to create differences of no more than: .25 between the bid and the offer for each option contract for which the bid is less than \$2, no more than .40 where the bid is \$2 or more but does not exceed \$5, no more than .50 where the bid is more than \$5 but does not exceed \$10, no more than .80 where the bid is more than \$10 but does not exceed \$20, and, no more than \$1 when the last bid is \$20.10 or more, provided that the Options Floor Trading Committee may establish differences other than the above for one or more series or classes of options. PCX Rule 6.82(c)(1) states that Lead Market Makers are required to disseminate market quotations accurately. A member who fails to quote markets within the maximum quote spread differentials or fails to disseminate market quotations accurately will be subject to disciplinary action pursuant to PCX Rule 10.13(h)(41). The proposed fines are \$500 for a first violation, \$1,000 for a second, and \$2,000 for a third.

Third, the Exchange proposes to adopt new PCX Rules 10.13(h)(42) and 10.13(k)(i)(42) for trading either before the opening or after the close of market pursuant to PCX Rule 4.2. PCX Rule 4.2 states that trading shall be limited to the hours during which the Exchange is open for the transaction of business. No member shall make any bid, offer or transaction upon the Floor before the official opening of the Exchange or after the closing of the market. Under the proposed rule, a member that trades either before the opening or after the close of market will be subject to disciplinary action pursuant to PCX

³ PCX Rule 6.76 is the priority rule applicable to PCX Plus.

Rule 10.13(h)(42). The proposed fines are \$1,000 for a first violation, \$2,500 for a second, and \$3,500 for a third.

Fourth, the Exchange proposes to adopt new PCX Rules 10.13(h)(43) and 10.13(k)(i)(43) into the MRP and RFS for violation of the two-sided quotation restriction for RMMs. PCX Rule 6.37(h)(5) restricts RMMs from entering two-sided quotations in options issues that are not included in their primary appointments. RMMs are, however, permitted to enter single-sided quotes and multiple orders to buy and sell the same option issues. Under the proposed rule, a RMM that enters a two-sided quotation in options issues outside of their primary appointments will be subject to disciplinary action pursuant to PCX Rule 10.13(h)(43). The proposed fines are \$500 for a first violation, \$1,000 for a second, and \$2,500 for a third.

Fifth, the Exchange proposes to adopt new PCX Rules 10.13(h)(44) and 10.13(k)(i)(44) for failure to maintain an accurate record of orders. PCX Rule 6.68 requires members to maintain and preserve a written record of every order for a period of time specified by the Commission. The proposed fines are \$500 for a first violation, \$1,000 for a second, and \$2,500 for a third.

The Exchange also proposes to amend PCX Rule 10.13(k)(i)(39) to include a fine schedule for RMMs' failure to meet the 60% quoting requirement. The proposed fine schedule for PCX Rule 10.13(h)(39) was inadvertently omitted in a previous rule filing,⁴ and it is consistent with the fines established for violations by a Market Maker involving the 75% primary appointment requirement and the 60% in-person trading requirement.⁵ In addition, the Exchange proposes to amend the text of current PCX Rules 10.13(h)(25) and 10.13(k)(i)(25) to include references to PCX Rule 6.37(h)(5) for purposes of clarifying the application of the fine schedule for violations by RMMs involving the 75% primary appointment requirement.

Finally, the Exchange proposes two amendments to PCX Rules 10.13(h)(33) and 10.13(k)(i)(33) of the MRP and RFS. First, the corresponding rule number will be changed to reflect the correct rule number, which is "Rule 6.87(d)(2)". Second, the equivalent rule violation in PCX Plus, "Rule 6.90(e)(1)", will be added to this MRP and RFS.

The Exchange believes that the proposed rule changes will serve to

significantly strengthen the ability of the Exchange to carry out its oversight responsibilities as a self-regulatory organization ("SRO"). The rules should also aid the Exchange in carrying out its surveillance and enforcement functions. Under the proposed rules, the Enforcement Department would continue to exercise its discretion under PCX Rule 10.13(f) and take cases out of the MRP to pursue them as formal disciplinary matters if the facts or circumstances warrant such action.⁶

In addition, two of the proposed rule adoptions (*i.e.*, Proposed PCX Rules 10.13(h)(40)–(41) and 10.13(k)(i)(40)–(41)) correspond to those found in the Chicago Board Options Exchange ("CBOE") and the American Stock Exchange ("Amex") MRP, respectively.⁷ Thus, the Exchange is proposing to include such rules into the MRP to conform to those found in other SROs' MRPs.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,⁸ in general, and Section 6(b)(5) of the Act,⁹ in particular, in that it will promote just and equitable principles of trade; facilitate transactions in securities, remove impediments to and perfect the mechanisms of a free and open market and a national market system; and protect investors and the public interest. The Exchange believes that the proposal is also consistent with Section 6(b)(6) of the Act,¹⁰ which requires that members and persons associated with members be appropriately disciplined for violations of Exchange rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

⁶ The Commission notes that certain of the rules that PCX proposes to add to its MRP relate to market making obligations, and further notes that it previously has indicated that "only the most technical and non-substantive violations" of a market maker's obligations should be handled pursuant to a minor rule plan. Securities Exchange Act Release No. 27878 (April 14, 1990), 55 FR 13345, [SR-NYSE-89-44].

⁷ See *e.g.*, CBOE Rule 17.50(g)(5) and Amex Rule 590G.

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ 15 U.S.C. 78f(b)(6).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the PCX. All submissions should refer to file number SR-PCX-2003-32 and should be submitted by December 3, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 03-28275 Filed 11-10-03; 8:45 am]

BILLING CODE 8010-01-P

⁴ See Securities Exchange Act Release No. 47838 (May 13, 2003), 68 FR 27129 (May 19, 2003) (Order approving PCX Plus).

⁵ See PCX Rules 10.13(k)(i)(25) and 10.13(k)(i)(26).

¹¹ 17 CFR 200.30-3(a)(12).

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****Aviation Proceedings, Agreements
Filed the Week Ending October 31,
2003**

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. Sections 412 and 414. Answers may be filed within 21 days after the filing of the application.

Docket Number: OST-2003-16416.

Date Filed: October 28, 2003.

Parties: Members of the International Air Transport Association.

Subject: PSC/Reso/119 dated October 14, 2003, Expedited Resolutions and Recommended Practices (RPs) r1-4, Intended effective date: January 1, 2004.

Andrea M. Jenkins,

*Program Manager, Docket Operations,
Federal Register Liaison.*

[FR Doc. 03-28347 Filed 11-10-03; 8:45 am]

BILLING CODE 4910-62-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****Notice of Intent To Rule on Request To
Release Airport Property at the
Edinburg International Airport,
Edinburg, TX**

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Notice of request to release
airport property.

SUMMARY: The FAA proposes to rule and invite public comment on the release of land at the Edinburg International Airport under the provisions of Section 125 of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21).

DATES: Comments must be received on or before December 12, 2003.

ADDRESSES: Comments on this application may be mailed or delivered to the FAA at the following address: Mr. Mike Nicely, Manager, Federal Aviation Administration, Southwest Region, Airports Division, Texas Airports Development Office, ASW-650, Fort Worth, Texas 76193-0650.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Arnold Vera, Public Works Director/Airport Manager, at the following address: City of Edinburg, 210 W. McIntyre, P.O. Box 1079, Edinburg, Texas 78540.

FOR FURTHER INFORMATION CONTACT: Mr. Rodney Clark, Program Manager,

Federal Aviation Administration, Texas Airports Development Office, ASW-650, 2601 Meacham Boulevard, Fort Worth, Texas 76193-0650, Telephone: (817) 222-5659, E-mail: *Rodney.Clark@faa.gov*, Fax: (817) 222-5989.

The request to release property may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the request to release property at the Edinburg International Airport under the provisions of the AIR 21.

The following is a brief overview of the request: The City of Edinburg requests the release of 1.4046 acres of non-aeronautical airport property. The land was purchased through the City's General Operating Budget in 1996. The funds generated by the release will be used for upgrading, maintenance, operation and development of the airport.

Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon request, inspect the application, notice and other documents relevant to the application in person at the Edinburg International Airport, telephone number (956) 383-5661.

Issued in Fort Worth, Texas, on October 23, 2003.

Naomi L. Saunders,

Manager, Airports Division.

[FR Doc. 03-28269 Filed 11-10-03; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****Agency Information Collection Activity
Under OMB Review**

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for extension of the currently approved collection. The ICR describes the nature of the information collection and the expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on July 25, 2003, page 44137.

DATES: Comments must be submitted on or before December 12, 2003. A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: Judy Street on (202) 267-9895.

SUPPLEMENTARY INFORMATION:**Federal Aviation Administration (FAA)**

Title: Overflight Billing and Collection Customer Information Form.

Type of Request: Extensions of a currently approved collection.

Form(s): NA.

Affected Public: A total of 600 air carriers.

Abstract: This information is needed to obtain accurate billing information for FAA air traffic and related services for certain aircraft that transit U.S. controlled airspace but neither take off from, nor land in, the United States. The respondents are air carriers who meet the criteria of transiting U.S. controlled airspace.

Estimated Annual Burden Hours: An estimated 50 hours annually.

ADDRESSES: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention FAA Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on November 3, 2003.

Judith D. Street,

*FAA Information Collection Clearance
Officer, Standards and Information Division,
APF-100.*

[FR Doc. 03-28266 Filed 11-10-03; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****Agency Information Collection Activity
Under OMB Review**

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*, this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for extension of the currently approved collection. The ICR describes the nature of the information collection and the expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on July 25, 2003, page 44137.

DATES: Comments must be submitted on or before December 12, 2003. A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: Judy Street on (202) 267-9895.

SUPPLEMENTARY INFORMATION:**Federal Aviation Administration (FAA)**

Title: Representative of the Administrator, 14 CFR part 183.

Type of Request: Extension of a currently approved collection.

OMB Control Number: 2120-0033.

Forms(s): FAA Forms 8110-14, 8110-28, 8710-6, 8710-10.

Affected Public: A total of 4,874 aviation trainers.

Abstract: Title 49, United States Code, section 44702 authorizes the appointment of approximately qualified persons to be representatives of the Administrator to allow those persons to examine, test and certify other persons for the purpose of issuing them pilot and instructor certificates. The information collected is used to determine the eligibility of the representatives.

Estimated Annual Burden Hours: An estimated 6,886 hours annually.

ADDRESSES: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention FAA Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of

automated collection techniques or other forms of information technology.

Issued in Washington, DC, on November 3, 2003.

Judith D. Street,

FAA Information Collection Clearance Officer, Standards and Information Division, APF-100.

[FR Doc. 03-28267 Filed 11-10-03; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****Agency Information Collection Activity Under OMB Review**

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for extension of the currently approved collection. The ICR describes the nature of the information collection and the expected burden. The **Federal Register** notice with a 60-day comment period soliciting comments on the following collection of information was published on April 17, 2003, on page 19066.

DATES: Comments must be submitted on or before December 12, 2003. A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: Judy Street on (202) 267-9895.

SUPPLEMENTARY INFORMATION:**Federal Aviation Administration (FAA)**

Title: Competition Plans, Passenger Facility Charges.

Type of Request: Extension of a currently approved collection.

OMB Control Number: 2120-0661.

Forms(s): NA.

Affected Public: A total of 40 public agencies controlling medium or large hub airports.

Abstract: This information is needed to meet the requirements of title 49, section 40117(k), Competition Plans, and to carry out a passenger facility charge application. No Passenger Facility Charge (PFC) may be approved for a covered airport and no Airport Improvement Program (AIP) grant may be made for a covered airport unless the airport has submitted a written competition plan in accordance with the statute. The affected public includes

public agencies controlling medium or large hub airports.

Estimated Annual Burden Hours: An estimated 4,860 hours annually.

ADDRESSES: Send comments to the office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention FAA Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on November 3, 2003.

Judith D. Street,

FAA Information Collection Clearance Officer, Standards and Information Division, PF-100.

[FR Doc. 03-28268 Filed 11-10-03; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****[Summary Notice No. PE-2003-64]****Petitions for Exemption; Summary of Petitions Received; Dispositions of Petitions Issued**

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of certain petitions seeking relief from specified requirements of 14 CFR, dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before November 24, 2003.

ADDRESSES: You may submit comments (identified by DOT DMS Docket Number FAA-2003-XXXXX) by any of the following methods:

Web site: <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site.

Fax: 1-202-493-2251.

Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-001.

Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Docket: For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Tim Adams (202) 267-8033, Sandy Buchanan-Sumter (202) 267-7271, Office of Rulemaking (ARM-1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85 and 11.91.

Issued in Washington, DC, on November 5, 2003.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Petitions for Exemption

Docket No.: FAA-2003-16218.

Petitioner: ATA Airlines, Inc.

Section of 14 CFR Affected: 14 CFR 93.123.

Description of Relief Sought: To permit ATA Airlines, Inc., to conduct 8 operations daily at LaGuardia Airport (LGA) in addition to the 22 LGA slots allocated currently to ATA.

Docket No.: FAA-2003-16195.

Petitioner: Comair, Inc.

Section of 14 CFR Affected: 14 CFR 93.123.

Description of Relief Sought: To permit Comair, Inc., to operate previously authorized AIR-21

exemption services between LaGuardia Airport and numerous small hub or non-hub airports.

Docket No.: FAA-2003-16195.

Petitioner: Spirit Airlines, Inc.

Section of 14 CFR Affected: 14 CFR 93.123.

Description of Relief Sought: To permit Spirit Airlines, Inc., to operate 8 slots at LaGuardia Airport (LGA) in addition to the 20 LGA slots allocated currently to Spirit Airlines, Inc.

[FR Doc. 03-28256 Filed 11-10-03; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application To Impose a Passenger Facility Charge (PFC) at Love Field, Dallas, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose a PFC at Love Field under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101-508) and Part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before December 12, 2003.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate copies to the FAA at the following address: Mr. G. Thomas Wade, Federal Aviation Administration, Southwest Region, Airports Division, Planning and Programming Branch, AWS-611, Fort Worth, Texas 76193-0610.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Kenneth Gwyn, Director of Aviation, City of Dallas at the following address: 8008 Cedar Springs Road, LB-16, Dallas, Texas 77235.

Air carriers and foreign air carriers may submit copies of the written comments previously provided to the Airport under § 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Mr. G. Thomas Wade, Federal Aviation Administration, Southwest Region, Airports Division, Planning and Programming Branch, ASW-611, Fort Worth, Texas 76193-0610, (817) 222-5613.

The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose a PFC at Dallas Love Field under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101-508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On October 30, 2003, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Airport was substantially complete within the requirements of § 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than February 26, 2004.

The following is a brief overview of the application.

Level of the proposed PFC: \$3.00.

Proposed charge effective date: January 1, 2005.

Proposed charge expiration date: January 1, 2012.

Total estimated PFC revenue: \$53,300,000.

PFC application number: 04-01-I-00-DAL.

Brief Description of Proposed Project(s)

Projects To Impose a PFC

1. Construct Light Rail Transit Station

Proposed class or classes of air carriers to be exempted from collecting PFC's: Air Taxi/Commercial Operators Filing FAA Form 1800-31, Non-scheduled Commuters/Small Certificated Air Carriers, Non-scheduled Large Certificated Air Carriers, Non-scheduled Foreign Flag Air Carriers, Scheduled Foreign Flag Air Carriers.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA regional Airports office located at: Federal Aviation Administration, Southwest Region, Airports Division, Planning and Programming Branch, ASW-610, 2601 Meachum Blvd., Fort Worth, Texas 76137-4298.

In addition, any person may, upon request, inspect in person the application, notice and other documents germane to the application at Dallas Love Field.

Issued in Fort Worth, Texas, on October 31, 2003.

Naomi L. Saunders,

Manager, Airports Division.

[FR Doc. 03-28270 Filed 11-10-03; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****Notice of Intent To Rule on Application 04-14-C-00-SJC To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Norman Y. Mineta San Jose International Airport, San Jose, CA**

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Norman Y.

Mineta San Jose International Airport under the provisions of the 49 U.S.C. 40117 and Part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before December 12, 2003.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Federal Aviation Administration, Airports Division, 15000 Aviation Blvd., Lawndale, CA 90261, or San Francisco Airports District Office, 831 Mitten Road, Room 210, Burlingame, CA 94010-1303.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Ralph G. Tonseth, Director of Aviation, city of San Jose, at the following address: 1732 N. First Street, Suite 600, San Jose, CA 95112. Air carriers and foreign air carriers may submit copies of written comments previously provided to the city of San Jose under § 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Maryls Lingsch, Airports Program Analyst, San Francisco Airports District Office, 831 Mitten Road, Room 210, Burlingame, CA 94010-1303, Telephone: (650) 876-2806. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Norman Y. Mineta San Jose International Airport under the provisions of the 49 U.S.C. 40117 and Part 158 of the Federal Aviation Regulations (14 CFR part 158).

On October 30, 2003, the FAA determined that the application to impose and use a PFC submitted by the city of San Jose was substantially complete within the requirements of § 158.25 of Part 158. The FAA will

approve or disapprove the application, in whole or in part, no later than January 29, 2004.

The following is a brief overview of the application.

Proposed charge effective date: August 1, 2014.

Proposed charge expiration date: September 1, 2017.

Level of proposed PFC: \$4.50.

Total estimated PFC revenue: \$97,197,000.

Brief description of the proposed project: Taxiway Y Reconstruction.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Nonscheduled/on-demand air carriers filling FAA Form 1800-31.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA Regional Airports Division located at: Federal Aviation Administration, Airports Division, 15000 Aviation Blvd., Lawndale, CA 90261. In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the city of San Jose.

Issued in Lawndale, California, on October 31, 2003.

Ellsworth L. Chan,

Acting Manager, Airports Division, Western-Pacific Region.

[FR Doc. 03-28265 Filed 11-10-03; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****[Policy Statement No. ANE-2002-35.15-R0]****Policy for Propeller Safety Analysis**

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of availability; policy statement.

SUMMARY: The Federal Aviation Administration (FAA) announces the availability of policy for propeller safety analysis.

DATES: The FAA issued policy statement number ANE-2002-35.15-R0 on October 30, 2003.

FOR FURTHER INFORMATION CONTACT: Jay Turnberg, FAA, Engine and Propeller Standards Staff, NAE-110, 12 New England Executive Park, Burlington, MA 01803; e-mail: jay.turnberg@faa.gov; telephone: (781) 238-7116; fax: (781) 238-7199. The policy statement is available on the Internet at the following address: <http://www.airweb.faa.gov/rgl>.

If you do not have access to the Internet, you may request a copy of the policy by contacting the individual listed in this section.

SUPPLEMENTARY INFORMATION: The FAA published a notice in the **Federal Register** on November 21, 2002 (67 FR 70295) to announce the availability of the proposed policy and invite interested parties to comment.

Background

The intent of this policy is to provide guidance for conducting a propeller safety analysis. Although 14 CFR part 35 does not explicitly require a safety analysis, safety analyses are frequently conducted to support part 35 requirements, special conditions, and aircraft manufacture certification requirements. This policy does not establish new requirements.

(Authority: 49 U.S.C. 106(g), 40113, 44701-44702, 44704.)

Issued in Burlington, Massachusetts, on October 30, 2003.

Francis A. Favara,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 03-28264 Filed 11-10-03; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION**Research and Special Programs Administration****[Docket RSPA-98-4957]****Extension of Existing Information Collection: Comment Request**

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice and request for public comments.

SUMMARY: This notice requests public participation in the Office of Management and Budget (OMB) approval process regarding an extension of an existing RSPA collection of information. RSPA intends to request OMB approval of information collection 2137-0596, National Pipeline Mapping Program under the Paperwork Reduction Act of 1995 and 5 CFR part 1320.

DATES: Comments on this notice must be received within 60 days of the publication date of this notice to be assured of consideration.

ADDRESSES: Interested persons are invited to send comments in duplicate to the Dockets Facility, U.S. Department of Transportation, Dockets Facility, 400 Seventh St., SW., Washington, DC 20590-0001 or e-mail to [http://](mailto:htp://)

dms.dot.gov. Please identify the docket and notice numbers shown in the heading of this notice.

FOR FURTHER INFORMATION CONTACT:

Marvin Fell, (202) 366-6205, to ask questions about this notice; or write by e-mail to *marvin.fell@rspa.dot.gov*.

SUPPLEMENTARY INFORMATION:

Title: National Pipeline Mapping System Program.

Type of Request: Extension of existing information collection.

Abstract: The Department of Transportation (DOT), along with other Federal and State agencies, has been working side by side with natural gas and hazardous liquid operators to develop a national pipeline mapping system (NPMS). This system depicts and provides data on the entire United States natural gas transmission and hazardous liquid pipeline system operating in the United States. The Pipeline Safety Improvement Act of 2002 promulgated on December 17, 2002, requires that all transmission pipeline operators provide maps of their pipelines. Additionally, it requires updates when ownership or operation of these lines change.

Estimate of Burden: 1 hour per mile.

Respondents: Gas transmission and hazardous liquid operators.

Estimated Number of Respondents: 900.

Estimated Total Annual Burden on Respondents: 157,112 hours.

This document can be reviewed between 10 A.M.—5 p.m. Monday through Friday, excluding Federal holidays, at the Dockets Facility, U.S. Department of Transportation, Room PL-401, 400 Seventh St., SW, Washington, DC 20590.

Comments are invited on: (a) The need for the proposed collection of information for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

All timely written comments to this notice will be summarized and included in the request for OMB approval. All comments will also be available to the public in the docket.

Issued in Washington, DC, on October 29, 2003.

Stacey Gerard,

Associate Administrator for Pipeline Safety.

[FR Doc. 03-28327 Filed 11-10-03; 8:45 am]

BILLING CODE 4910-60-P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Pipeline Safety: Corrosion Threat to Newly Constructed Gas Transmission and Hazardous Liquid Pipelines

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice; issuance of advisory bulletin.

SUMMARY: RSPA's Office of Pipeline Safety (OPS) is issuing this advisory bulletin to owners and operators of natural gas and hazardous liquid pipelines to consider the threat from external corrosion during and immediately after construction of new steel pipelines or pipeline segments. Operators are strongly encouraged to determine whether new pipelines are susceptible to interference and damage from stray electrical currents. Operators should carefully monitor and take action to mitigate any detrimental effects.

FOR FURTHER INFORMATION CONTACT:

Richard Huriaux, (202) 366-4565; or by e-mail, *richard.huriaux@rspa.dot.gov*.

This document can be viewed at the OPS Home page at *http://ops.dot.gov*. General information about the RSPA/OPS programs may be obtained by accessing RSPA's Home page at *http://rspa.dot.gov*.

I. Advisory Bulletin (ADB-03-06)

To: Owners and Operators of Gas Transmission and Hazardous Liquid Pipeline Systems.

Subject: Corrosion Threat to Newly Constructed Gas Transmission and Hazardous Liquid Pipelines.

Purpose: To advise owners and operators of natural gas transmission and hazardous liquid pipelines to consider external corrosion as a possible safety risk to newly constructed pipelines and to identify and remediate the detrimental effects of stray currents during and after construction.

Advisory: Each operator of a natural gas transmission or hazardous liquid pipeline should determine whether new steel pipelines are susceptible to detrimental effects from stray electrical currents. Based on this evaluation, an operator should carefully monitor and

take action to mitigate detrimental effects. The operator should give special attention to a new pipeline's physical location, particularly a location that may subject the new pipeline to stray currents from other underground facilities, including other pipelines, and induced currents from electrical transmission lines, whether aboveground or underground. Operators are strongly encouraged to review their corrosion control programs and to have qualified corrosion personnel present during construction to identify, mitigate, and monitor any detrimental stray currents that might damage new pipelines.

SUPPLEMENTARY INFORMATION:

II. Background

This action follows the discovery of substantial external corrosion on a newly constructed gas transmission pipeline. The pipeline had been in service a little over two years when this unexpected corrosion was revealed by a high-resolution, inline inspection tool. The pipe wall pitting was consistent with that caused by underground stray electrical current before a cathodic protection system is installed. In some isolated areas, the pipeline exhibited more than 50% wall loss. Corrosion due to stray current is most often found on pipelines that cross other underground structures (such as other pipelines) or that follow overhead electric transmission lines.

Pipelines are often routed along common use right-of-ways. This presents complicated corrosion scenarios that must be addressed by corrosion engineers. In some instances, the common right-of-way includes high voltage power lines that can induce alternating current on a new pipeline. This can result in significant corrosion damage to the pipeline in a short period. In other instances, the common right-of-way will cross or parallel foreign pipelines. This requires consideration of the effects of electrical interference from foreign pipeline cathodic protection systems, both on the new pipeline and on the existing foreign pipeline.

Corrosion control on gas transmission and hazardous liquid pipelines is addressed in the Federal Pipeline Safety Regulations at 49 CFR part 192, subpart I and part 195, subpart H. Although 49 CFR 192.455(a)(2) and 195.563(a) state that a cathodic protection system must be installed and placed in operation within one year after completion of construction, operators are encouraged to have qualified corrosion personnel identify, mitigate, and monitor any

detrimental stray currents prior to and during construction.

Operators should refer to recommended practices provided by national consensus standards organizations, such as the American Society of Mechanical Engineers (ASME) standards B31.4 and B31.8, NACE International (NACE) corrosion standards, and Gas Piping Technology Committee (GPTC) guidance documents for help in addressing stray underground electrical current interference on gas transmission and hazardous liquid pipelines.

Issued in Washington, DC, on November 5, 2003.

Stacey L. Gerard,

Associate Administrator for Pipeline Safety.

[FR Doc. 03-28326 Filed 11-10-03; 8:45 am]

BILLING CODE 4910-60-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34426]

Union Pacific Railroad Company— Temporary Trackage Rights Exemption—The Burlington Northern and Santa Fe Railway Company

The Burlington Northern and Santa Fe Railway Company (BNSF) has agreed to grant temporary overhead trackage rights to Union Pacific Railroad Company (UP) over BNSF's rail line between BNSF milepost 768.89 near Dallas (Forest Avenue), TX, and BNSF milepost 60.6 near Houston (Belt Junction), TX, a distance of approximately 247.5 miles.¹

The transaction was scheduled to be consummated on November 1, 2003,² and the authorization is scheduled to expire on or about December 23, 2003. The purpose of the temporary trackage rights is to facilitate maintenance work on UP lines.

As a condition to this exemption, any employees affected by the temporary trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

¹ The trackage rights involve BNSF subdivisions with non-contiguous mileposts. Therefore, total mileage does not correspond to the milepost designations of the endpoints.

² The notice was filed with the Board on October 23, 2003. Accordingly, the earliest the transaction could be consummated was October 30, 2003 (7 days after filing under 49 CFR 1180.4(g)).

This notice is filed under 49 CFR 1180.2(d)(8).³ If it contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34426, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on Robert T. Opal, 1416 Dodge Street, Room 830, Omaha, NE 68179.

Board decisions and notices are available on the Board's Web site at "<http://www.stb.dot.gov>."

Decided: November 3, 2003.

By the Board, David M. Konschnik,
Director, Office of Proceedings.

Vernon A. Williams,
Secretary.

[FR Doc. 03-28153 Filed 11-10-03; 8:45 am]

BILLING CODE 4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34420]

CSX Transportation, Inc.—Trackage Rights Exemption—R.J. Corman Railroad Company/Memphis Line; R.J. Corman Railroad Company/Central Kentucky Lines, LLC—Trackage Rights Exemption—CSX Transportation, Inc.

Pursuant to a written master trackage rights agreement dated October 15, 2003, R.J. Corman Railroad Company/Memphis Line (RJCM) has agreed to grant overhead trackage rights to CSX Transportation, Inc. (CSXT) between CSXT milepost F-118.74/RJCM milepost LF-118.74 at Memphis Junction, KY, and RJCM milepost D-152 at Lewisburg, KY, a distance of approximately 33 miles, and CSXT has agreed to grant overhead trackage rights to R.J. Corman Railroad Company/Central Kentucky Lines, LLC (RJCC) between CSXT milepost VB113.81 at Winchester, KY, connecting to CSXT's CC Subdivision at milepost KC96.1 and CSXT milepost KC131.0 at Berea, KY, a distance of approximately 35 miles.

³ The Board adopted a new class exemption for trackage rights that, by their terms, are for overhead operations only and expire on a date certain, not to exceed 1 year from the effective date of the exemption. See *Railroad Consolidation Procedures—Exemption for Temporary Trackage Rights*, STB Ex Parte No. 282 (Sub-No. 20) (STB served May 23, 2003).

The parties state that consummation of the transaction was scheduled to occur on November 1, 2003.

The purpose of the trackage rights is to provide run through unit train service between Berea and Louisville, KY, and between Louisville and Lewisburg, KY.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the exemption.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34420, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on Michael W. Blaszk, 211 South Leitch Ave., La Grange, IL 60525-2162, and Ronald A. Lane, Fletcher & Sippel LLC, 29 N. Wacker Drive, Suite 920, Chicago, IL 60606.

Board decisions and notices are available on our Web site at <http://www.stb.dot.gov>."

Decided: November 3, 2003.

By the Board, David M. Konschnik,
Director, Office of Proceedings.

Vernon A. Williams,
Secretary.

[FR Doc. 03-28199 Filed 11-10-03; 8:45 am]

BILLING CODE 4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB-33 (Sub-No. 211X)]

Union Pacific Railroad Company— Abandonment Exemption—In Alameda County, CA

Union Pacific Railroad Company (UP) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon a 5.38-mile line of railroad in the Milpitas Subdivision from milepost 0.00 near Clark Drive at Niles Junction to milepost 5.38 near Washington Boulevard, in or near Freemont, Alameda County, CA.¹

¹ The portion of the line extending from milepost 2.61 to the end of the proposed abandonment at milepost 5.38 was sold by UP to the Santa Clara

The line traverses United States Postal Service Zip Codes 94536, 94538 and 94539.

UP has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic will move over a parallel UP line, which is no more than one-half mile from the instant line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.*—

Abandonment-Goshen, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on December 12, 2003, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,² formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),³ and trail use/rail banking requests under 49 CFR 1152.29 must be filed by November 24, 2003. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by December 2, 2003, with the Surface Transportation Board, 1925 K Street, NW, Washington, DC 20423-0001.

A copy of any petition filed with the Board should be sent to UP's representative: Mack H. Shumate, Jr., Senior General Attorney, Union Pacific

Valley Transportation Authority in December 2002. UP, however, retained the right to provide freight service, which it now seeks to abandon, over that segment of the right-of-way.

² The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. See *Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

³ Each OFA must be accompanied by the filing fee, which currently is set at \$1,100. See 49 CFR 1002.2(f)(25).

Railroad Company, 101 North Wacker Dr., Room 1920, Chicago, IL 60606.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

UP has filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. SEA will issue an environmental assessment (EA) by November 17, 2003. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423-0001) or by calling SEA, at (202) 565-1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), UP shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by UP's filing of a notice of consummation by November 12, 2004, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at "<http://www.stb.dot.gov>."

Decided: November 5, 2003.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,
Secretary.

[FR Doc. 03-28300 Filed 11-10-03; 8:45 am]

BILLING CODE 4915-00-P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 4, 2003.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department

Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before December 12, 2003, to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545-1855.

Regulation Project Number: REG-141402-02 NPRM and Temporary.

Type of Review: Extension.

Title: Limitation on Use of the Nonaccrual-Experience Method of Accounting Under Section 48(d)(5).

Description: The regulations provide four safe harbor nonaccrual-experience methods that will presumed to clearly reflect a taxpayer's nonaccrual experience, and for taxpayers who wish to compute their nonaccrual experience using a computation or formula other than the one of the four safe harbors provided, the requirements that must be met in order to use an alternative computation or formula to compute their nonaccrual experience.

Respondents: Business or other for-profit.

Estimated Number of Recordkeepers: 8,000.

Estimated Burden Hours
Recordkeeper: 3 hours.

Frequency of Response: Annually.

Estimated Total Reporting Burden: 24,000 hours.

Clearance Officer: R. Joseph Durbala, (202) 622-3634, Internal Revenue Service, Room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Joseph F. Lackey, Jr., (202) 395-7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Treasury PRA Clearance Officer.

[FR Doc. 03-28272 Filed 11-10-03; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY**Office of the Comptroller of the Currency****BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM****FEDERAL DEPOSIT INSURANCE CORPORATION****DEPARTMENT OF THE TREASURY****Office of Thrift Supervision****Agency Information Collection Activities: Proposed Extension of Information Collection; Comment Request**

AGENCIES: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); and Office of Thrift Supervision (OTS), Treasury.

ACTION: Joint notice and request for comment.

SUMMARY: The OCC, Board, FDIC, and OTS (collectively, the Agencies), as part of their continuing effort to reduce paperwork and respondent burden, invite the general public and other Federal agencies to comment on the proposed extension, without revision, of their continuing information collections, as required by the Paperwork Reduction Act of 1995. The Agencies may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. Currently, the Agencies are soliciting comment concerning the proposed extension of OMB approval of the information collections contained in their respective Consumer Protections for Depository Institution Sales of Insurance regulations.

DATES: Comments should be submitted by January 12, 2004.

ADDRESSES: Comments should be directed to the Agencies and the OMB Desk Officer for the Agencies as follows:

OCC: Office of the Comptroller of the Currency, Public Information Room, Mail Stop 1-5, Attention: 1557-0220, 250 E Street, SW., Washington, DC 20219. Due to delays in delivery of paper mail in the Washington area, commenters are encouraged to submit comments by fax or electronic mail. Comments may be sent by fax to (202) 874-4448, or by electronic mail to regs.comments@occ.treas.gov. You can

inspect and photocopy comments at the OCC's Public Information Room, 250 E Street, SW., Washington, DC 20219. You can make an appointment to inspect the comments by calling (202) 874-5043.

Board: Written comments may be mailed to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW, Washington, DC 20551. However, because paper mail in the Washington area and at the Board of Governors is subject to delay, please consider submitting your comments by electronic mail to regs.comments@federalreserve.gov, or faxing them to the Office of the Secretary at (202) 452-3819 or (202) 452-3102. Members of the public may inspect comments in Room M-P-500 between 9:00 a.m. and 5:00 p.m. on weekdays pursuant to 261.12, except as provided in 261.14, of the Board's Rules Regarding Availability of Information, 12 CFR 261.12 and 261.14.

FDIC: Steven F. Hanft, Paperwork Clearance Officer, Legal Division, Room MB-3064, Attention: Comments/Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429. All comments should refer to "Community Reinvestment Act Regulation, 3064-0092." Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m. Comments also may be sent by fax to (202) 898-3838, or by electronic mail to comments@fdic.gov. Comments may be inspected and photocopied in the FDIC Public Information Center, Room 100, 801 17th Street, NW, Washington, DC between 9:00 a.m. and 4:30 p.m. on business days.

OTS: Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW, Washington, DC 20552, Attention: 1550-0106, Fax number (202) 906-6518, or e-mail to infocollection.comments@ots.treas.gov. OTS will post comments and the related index on the OTS Internet Site at www.ots.treas.gov. In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW, by appointment. To make an appointment, call (202) 906-5922, send an e-mail to publicinfo@ots.treas.gov, or send a facsimile transmission to (202) 906-7755.

OMB Desk Officer for the Agencies: Joseph F. Lackey, Jr., Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235,

Washington, DC 20503, or e-mail to jlackeyj@omb.eop.gov.

FOR FURTHER INFORMATION CONTACT: You may request additional information from:

OCC: Patrick Tierney, Attorney, Acting OCC Clearance Officer, (202) 874-5090, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219.

Board: Cynthia Ayouch, Federal Reserve Board Clearance Officer, (202) 452-3829, Division of Research and Statistics, Board of Governors of the Federal Reserve System, 20th and C Streets, NW, M/S 41, Washington, DC 20551.

FDIC: Steven F. Hanft, Paperwork Clearance Officer, (202) 898-3907, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.

OTS: Marilyn K. Burton, OTS Clearance Officer, (202) 906-6467, Office of Thrift Supervision, 1700 G Street, NW, Washington, DC 20552.

SUPPLEMENTARY INFORMATION: Titles:

OCC: Consumer Protection in Sales of Insurance - 12 CFR 14.

Board: Disclosure Requirements in Connection With Regulation H (Consumer Protections in Sales of Insurance).

FDIC: Insurance Sales Consumer Protections.

OTS: Consumer Protections for Depository Institutions Sales of Insurance.

OMB Control Numbers:

OCC: 1557-0220.

Board: 7100-0298.

FDIC: 3064-0140.

OTS: 1550-0106.

Type of Review: Extension, without revision, of a currently approved collection.

Form Number: None.

Abstract: This submission covers an extension of the Agencies' currently approved information collections in their regulations (12 CFR part 14 (OCC); 12 CFR part 208 (Board); 12 CFR part 343 (FDIC); and 12 CFR part 536 (OTS)). The submission involves no change to the regulations or to the information collection requirements.

The information collection requirements contained in the regulations are as follows:

Covered persons are required to make insurance disclosures before the completion of the initial sale of an insurance product or annuity to a consumer. The disclosure must be made orally and in writing to the consumer that: 1) the insurance product or annuity is not a deposit or other obligation of,

or guaranteed by, the financial institution or an affiliate of the financial institution; 2) the insurance product or annuity is not insured by the FDIC or any other agency of the United States, the financial institution, or (if applicable) an affiliate of the financial institution; and 3) in the case of an insurance product or annuity that involves an investment risk, there is investment risk associated with the product, including the possible loss of value. Sections .40(a) (OCC); .84(a) (Board); .40(a)(FDIC); .40(a)(OTS).

Covered persons are required to make a credit disclosure at the time a consumer applies for an extension of credit in connection with which an insurance product or annuity is solicited, offered, or sold. The disclosure must be made orally and in writing that the financial institution may not condition an extension of credit on either: 1) the consumer's purchase of an insurance product or annuity from the financial institution or any of its affiliates; or 2) the consumer's agreement not to obtain, or a prohibition on the consumer from obtaining, an insurance product or annuity from an unaffiliated entity. Section .40(b)(OCC); .84(b)(Board); .40(b)(FDIC); .40(b)(OTS).

Affected Public: Businesses or other for-profit.

Burden Estimates:

In 2000, the Agencies jointly published a notice in the Federal Register that contained the Agencies' burden estimates for their information collections. The Board, FDIC, and OTS used the same methodology for calculating the paperwork burden on their respondents; however, the OCC used a different methodology.

In 2003, an interagency working group¹ agreed to jointly review the paperwork burden of their sale of insurance regulations. To avoid expiration of the authority for the information collections while the review is being completed, the group agreed to publish for comment estimates based on year 2000 assumptions. After the Agencies' public comment has closed, they will jointly review all comments received and determine the best method for calculating the burden. The Agencies will revise their estimates and publish a joint final notice when they submit their information collections to OMB for review.

Estimated Number of Respondents:

OCC: 1,949
Board: 1,010
FDIC: 5,800

OTS: 1,097

Estimated Number of Responses:

OCC: 1,949

Board: 553,480

FDIC: 920,000

OTS: 567,432

Estimated Annual Burden Hours:

OCC: 19,490 hours

Board: 46,123 hours

FDIC: 76,667 hours

OTS: 47,286 hours

Frequency of Response: On occasion.

Comments:

Comments submitted in response to this notice will be summarized in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

(a) Whether the collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;

(b) The accuracy of the agency's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: October 28, 2003.

Mark J. Tenhundfeld,

Assistant Director, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, November 5, 2003.

Jennifer J. Johnson,

Secretary of the Board.

Dated at Washington, D.C., this 27th day of November, 2003.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

Dated: November 4, 2003.

James E. Gilleran,

Deputy Chief Counsel, Regulations Director and Legislation Division, Office of Thrift Supervision.

[FR Doc. 03-28344 Filed 11-10-03; 8:45 am]

BILLING CODES 4810-33-P; 6210-01-P; 6714-01-P; 6720-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[INTL-112-88]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Pub. L. 104-13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, INTL-112-88 (TD 8337), Allocation and Apportionment of Deduction for State Income Taxes (Section 1.861-8(e)(6)).

DATES: Written comments should be received on or before January 12, 2004 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Larnice Mack at (202) 622-3179, or Larnice.Mack@irs.gov, or Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Allocation and Apportionment of Deduction for State Income Taxes.

OMB Number: 1545-1224.

Regulation Project Number: INTL-112-88.

Abstract: This regulation provides guidance on when and how the deduction for state income taxes is to be allocated and apportioned between gross income from sources within and without the United States in order to determine the amount of taxable income from those sources. The reporting requirements in the regulation affect those taxpayers claiming foreign tax credits who elect to use an alternative method from that described in the regulation to allocate and apportion deductions for state income taxes.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

¹ The working group consists of staff from the OCC, Board, FDIC, and OTS.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 1,000.

Estimated Time Per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 1,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 4, 2003.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 03-28349 Filed 11-10-03; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 3520

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort

to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Pub. L. 104-13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts.

DATES: Written comments should be received on or before January 12, 2004 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala Internal Revenue Service, Room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Larnice Mack at Internal Revenue Service, room 6407, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622-3179, or through the Internet at Larnice.Mack@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts.

OMB Number: 1545-0159.

Form Number: 3520.

Abstract: Form 3520 is filed by U.S. persons who create a foreign trust, transfer property to a foreign trust, receive a distribution from foreign trust, or receive large gifts from a foreign source. IRS uses the form to identify U.S. persons who have transactions that may trigger a taxable event in the future.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 2000.

Estimated Time Per Response: 53 hours, 56 minutes.

Estimated Total Annual Burden Hours: 107,880.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and

tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 30, 2003.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 03-28350 Filed 11-10-03; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 97-66

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Pub. L. 104-13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Notice 97-66, Certain Payments Made Pursuant to a Securities Lending Transaction.

DATES: Written comments should be received on or before January 12, 2004 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6411, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or

copies of notice should be directed to Carol Savage at Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622-3945, or through the Internet at CAROL.A.SAVAGE@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Certain Payments Made Pursuant to a Securities Lending Transaction.

OMB Number: 1545-1566.

Notice Number: Notice 97-66.

Abstract: Notice 97-66 modifies final regulations which were effective November 14, 1997. The notice relaxes the statement requirement with respect to substitute interest payments relating to securities loans and sale-repurchase transactions. It also provides a withholding mechanism to eliminate excessive withholding on multiple payments in a chain of substitute dividend payments.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 377,500.

Estimated Time Per Respondent: 10 minutes.

Estimated Total Annual Burden Hours: 61,750.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including

through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 5, 2003.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 03-28351 Filed 11-10-03; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Small Business/Self Employed—Schedule C Non-Filers Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Small Business/Self Employed—Schedule C Non-Filers Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The TAP will be discussing issues pertaining to increasing compliance and lessening the burden for Small Business/Self Employed individuals. Recommendations for IRS systemic changes will be developed.

DATES: The meeting will be held Tuesday, December 9, 2003.

FOR FURTHER INFORMATION CONTACT: Mary O'Brien at 1-888-912-1227, or 206-220-6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Small Business/Self Employed—Schedule C Non-Filers Committee of the Taxpayer Advocacy Panel will be held Tuesday, December 9, 2003 from 11 a.m. EST to 12:30 p.m. EST via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1-888-912-1227 or 206-220-6096, or write to Mary O'Brien, TAP Office, 915 2nd Avenue, MS W-406, Seattle, WA 98174. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Mary O'Brien. Ms O'Brien can be reached at 1-888-912-1227 or 206-220-6096.

The agenda will include the following: Various IRS issues.

Dated: November 5, 2003.

Sandra L. McQuin,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 03-28352 Filed 11-10-03; 8:45 am]

BILLING CODE 4830-01-U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 5 Taxpayer Advocacy Panel (Including the States of Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Texas)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Area 5 Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Monday, December 8, 2003, at 3 p.m., Central standard time.

FOR FURTHER INFORMATION CONTACT: Mary Ann Delzer at 1-888-912-1227, or (414) 297-1604.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 5 Taxpayer Advocacy Panel will be held Monday, December 8, 2003, from 3 to 4 p.m. Central standard time via a telephone conference call. You can submit written comments to the panel by faxing to (414) 297-1623, or by mail to Taxpayer Advocacy Panel, Stop 1006MIL, 310 West Wisconsin Avenue, Milwaukee, WI 53203-2221. Public comments will also be welcome during the meeting. Please contact Mary Ann Delzer at 1-888-912-1227 or (414) 297-1604 for more information.

The agenda will include the following: Various IRS issues.

Dated: November 4, 2003.

Sandy McQuin,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 03-28353 Filed 11-10-03; 8:45 am]

BILLING CODE 4830-01-U

DEPARTMENT OF THE TREASURY**Internal Revenue Service****Open Meeting of the Small Business/
Self Employed—Payroll Committee of
the Taxpayer Advocacy Panel**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Small Business/Self Employed—Payroll Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The TAP will be discussing issues pertaining to increasing compliance and lessening the burden for Small Business/Self Employed individuals. Recommendations for IRS systemic changes will be developed.

DATES: The meeting will be held Thursday, December 4, 2003.

FOR FURTHER INFORMATION CONTACT: Mary O'Brien at 1-888-912-1227, or 206-220-6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Small Business/Self Employed—Payroll Committee of the Taxpayer Advocacy Panel will be held Thursday, December 4th, 2003 from 3 pm EDT to 4:30 p.m. EDT via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1-888-912-1227 or 206-220-6096, or write to Mary O'Brien, TAP Office, 915 2nd Avenue, MS W-406, Seattle, WA 98174. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Mary O'Brien. Ms. O'Brien can be reached at 1-888-912-1227 or 206-220-6096.

The agenda will include the following: Various IRS issues.

Dated: November 5, 2003.

Sandra L. McQuin,

Director, Taxpayer Advocacy Panel.

[FR Doc. 03-28354 Filed 11-10-03; 8:45 am]

BILLING CODE 4830-01-U

DEPARTMENT OF THE TREASURY**Internal Revenue Service****Open Meeting of the Area 7 Taxpayer
Advocacy Panel (Including the State of
California)**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Area 7 committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel (TAP) is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. The TAP will use citizen input to make recommendations to the Internal Revenue Service.

DATES: The meeting will be held Tuesday, December 2, 2003.

FOR FURTHER INFORMATION CONTACT: Mary Peterson O'Brien at 1-888-912-1227, or 206-220-6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 7 Taxpayer Advocacy Panel will be held Tuesday, December 2, 2003 from 9 a.m. Pacific Time to 10 a.m. Pacific Time via telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1-888-912-1227 or 206-220-6096, or write to Mary Peterson O'Brien, TAP Office, 915 2nd Avenue, MS W-406, Seattle, WA 98174. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Mary Peterson O'Brien. Ms. O'Brien can be reached at 1-888-912-1227 or 206-220-6096.

The agenda will include the following: Various IRS issues.

Dated: November 5, 2003.

Sandra L. McQuin,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 03-28355 Filed 11-10-03; 8:45 am]

BILLING CODE 4830-01-U

DEPARTMENT OF THE TREASURY**Internal Revenue Service****Open Meeting of the Area 1 Taxpayer
Advocacy Panel (Including the States
of New York, Connecticut,
Massachusetts, Rhode Island, New
Hampshire, Vermont and Maine)**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Area 1 Taxpayer Advocacy Panel will be conducted in New York City, NY. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Monday, December 8 and Tuesday, December 9, 2003.

FOR FURTHER INFORMATION CONTACT: Marisa Knispel at 1-888-912-1227 (toll-free), or 718-488-3557 (non toll-free).

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 1 Taxpayer Advocacy Panel will be held Monday, December 8, 2003 from 9 am to 5 pm ET and Tuesday, December 9, 2003 from 9 am to 12 pm ET. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1-888-912-1227 or 718-488-3557, or write Marisa Knispel, TAP Office, 10 MetroTech Center, 625 Fulton Street, Brooklyn, NY 11201.

The agenda will include various IRS issues.

Dated: November 4, 2003.

Sandra L. McQuin,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 03-28356 Filed 11-10-03; 8:45 am]

BILLING CODE 4830-01-U

Corrections

Federal Register

Vol. 68, No. 218

Wednesday, November 12, 2003

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act Notice

Correction

In notice document 03-28240
appearing on page 63096 in the issue of

Friday, November 7, 2003, make the
following correction:

In the third column, the **TIME AND DATE**
heading should read: "9 a.m. (e.s.t.);
November 17, 2003."

[FR Doc. C3-28240 Filed 11-10-03; 8:45 am]

BILLING CODE 1505-01-D



Federal Register

**Wednesday,
November 12, 2003**

Part II

Department of Defense

**Department of the Army, Corps of
Engineers**

**33 CFR Part 385
Programmatic Regulations for the
Comprehensive Everglades Restoration
Plan; Final Rule**

DEPARTMENT OF DEFENSE**Department of the Army, Corps of Engineers****33 CFR Part 385****RIN 0710-AA49****Programmatic Regulations for the Comprehensive Everglades Restoration Plan****AGENCY:** Army Corps of Engineers, DOD.**ACTION:** Final rule.

SUMMARY: The Army promulgates this final rule to establish programmatic regulations for the Comprehensive Everglades Restoration Plan. Congress approved the Comprehensive Everglades Restoration Plan in section 601 of the Water Resources Development Act of 2000, which was enacted into law on December 11, 2000. The Act requires the Secretary of the Army to promulgate programmatic regulations to ensure that the goals and purposes of the Comprehensive Everglades Restoration Plan are achieved. We have developed this final rule in response to that statutory requirement. The rule establishes processes and procedures that will guide the Army Corps of Engineers in the implementation of the Comprehensive Everglades Restoration Plan.

Today's action completes a rulemaking that began on August 2, 2002 with the publication of proposed regulations. The final rule contains a number of revisions that respond to public comments on the proposed regulations.

DATES: This rule is effective December 12, 2003.

FOR FURTHER INFORMATION CONTACT: Stu Appelbaum, Corps of Engineers, Jacksonville District, at the above address by telephone (904) 232-1877, or by fax (904) 232-1434. You may also access the programmatic regulations Web page at: http://www.evergladesplan.org/pm/progr_regs.cfm/.

SUPPLEMENTARY INFORMATION:**I. Background**

Section 601(h)(3) of the Water Resources Development Act of 2000, Public Law 106-541 (114 Stat. 2688) (hereinafter "WRDA 2000") requires the Secretary of the Army, after notice and opportunity for public comment, to promulgate regulations to ensure that the goals and purposes of the Comprehensive Everglades Restoration Plan (the Plan) are achieved. These final

regulations fulfill this requirement and establish the administrative structure for carrying out the Plan.

The programmatic regulations establish a process: for the development of Project Implementation Reports, Project Cooperation Agreements, and Operating Manuals that will ensure that the goals and the objectives of the Comprehensive Everglades Restoration Plan (CERP) are achieved; to ensure that new information resulting from changes or unforeseen circumstances, new scientific or technical information or information that is developed through the principles of adaptive management contained in the Plan, and future authorized changes to the Plan will be integrated into the implementation of the Plan; and, to ensure the protection of the natural system consistent with the goals and purposes of the Plan, including the establishment of interim goals to provide a means by which the restoration success of the Plan will be evaluated throughout the implementation process.

The programmatic regulations recognize that the Everglades are a critical national resource in which the public has an important interest. Restoration of the Everglades involves many complicated issues involving ecosystem restoration, other water-related needs of the region, novel scientific and technical information and technology, and adaptive management. The final regulations envision a comprehensive process to involve the public, and the agencies that represent them, in important decisions involved in implementing the project.

In general, the programmatic regulations envision that the goals and purposes of the Plan will be achieved through the development of project-specific and system-wide measures. Project specific measures include but are not limited to Project Implementation Reports, Project Cooperation Agreements, Pilot Project Technical Data Reports, and Operating Manuals. The more generally applicable system-wide measures include, but are not limited to, the development of guidance memoranda, the Master Implementation Sequencing Plan, interim goals for evaluating the restoration success of the Plan, and interim targets for evaluating progress towards achieving other water-related needs of the region, including water supply and flood protection. The interim goals for evaluating the restoration success of the Plan and interim targets for other water-related needs are of special significance. They establish incremental targets to evaluate progress toward the expected level of

performance of the Plan and are used to monitor overall progress toward meeting the goals and purposes of the Plan.

Taken together, the project specific and system-wide measures form the foundation of the Plan and are critical to the successful restoration of the South Florida ecosystem.

The South Florida ecosystem is a nationally and internationally unique and important natural resource. It is also a resource in peril, having been severely affected by human activities for over a hundred years. The Central and Southern Florida Project extends from south of Orlando to the Florida Keys and is composed of a regional network of canals, levees, water storage areas, and water control structures. First authorized by Congress in 1948, the project serves multiple objectives. The objectives of the project include flood control, regional water supply for agricultural and urban areas, prevention of salt water intrusion, water supply to Everglades National Park, preservation of fish and wildlife, recreation, and navigation. While fulfilling these objectives, the project has had unintended adverse effects on the unique natural environment that constitutes the Everglades and South Florida ecosystem. In 1996, the Army Corps of Engineers was directed to develop a comprehensive plan to restore, preserve, and protect South Florida's natural ecosystem while providing for the water-related needs of the region, including flood control, the enhancement of water supplies, and other objectives of the Central and South Florida Project. The resulting plan, which was submitted to Congress on July 1, 1999, is called the Comprehensive Everglades Restoration Plan.

The overarching goal of the Plan is the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, such as flood protection and water supply. As submitted to Congress, the Plan contained 68 major components that anticipated the creation of approximately 217,000 acres of reservoirs and wetland-based water treatment areas, wastewater reuse plants, seepage management, and the removal of levees and canals in natural areas. These components vastly increase storage and water supply for the natural system, as well as for urban and agricultural needs, while continuing to fulfill the original objectives of the existing Central and Southern Florida Project. The Comprehensive Everglades Restoration Plan will restore more natural flows of water, including sheet flow; improve water quality; and

establish more natural hydroperiods in the South Florida ecosystem. Improvements to fish and wildlife habitat, including those that benefit threatened and endangered species, are expected to occur as a result of the restoration of hydrologic conditions. This will promote the recovery of native flora and fauna, including threatened and endangered species.

In enacting section 601 of WRDA 2000, Congress approved the Comprehensive Everglades Restoration Plan as a framework for modifications to the Central and Southern Florida Project. Section 601 of WRDA 2000 contains a variety of provisions associated with implementation of the Comprehensive Everglades Restoration Plan, including an authorization for the construction of four pilot projects and ten initial projects of the Comprehensive Everglades Restoration Plan.

Section 601(h) of WRDA 2000 states, "the overarching objective of the Plan is the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection." This section directs that the Plan be implemented to ensure the protection of water quality in, the reduction of the loss of fresh water from, and the improvement of the environment of the South Florida Ecosystem. Implementation of the Plan also seeks to achieve and maintain the benefits to the natural system and human environment described in the Plan.

Section 601(h)(2) of WRDA 2000 requires the President and Governor to enter into a binding agreement ensuring that the water generated by the Plan will be made available to the natural system. The President and Governor signed this agreement on January 9, 2002. The agreement specifies that the State will ensure by regulation, or other appropriate means, that water made available by each project in the Plan will not be permitted for a consumptive use or otherwise made unavailable by the State until such time as sufficient reservations of water for the restoration of the natural system are made under State law in accordance with the Project Implementation Report for that project and consistent with the Plan. This agreement also specifies that the State will monitor and assess the continuing effectiveness of reservations as long as the project is authorized in order to achieve the goals and objectives of the Plan.

Section 601(h)(3) of WRDA 2000 requires that the Secretary of the Army,

after notice and opportunity for public comment, and with the concurrence of the Governor of Florida and the Secretary of the Interior, and in consultation with the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Administrator of the Environmental Protection Agency, the Secretary of Commerce, and other Federal, State, and local agencies, issue programmatic regulations within two years of the date of enactment of WRDA 2000 to ensure that the goals and purposes of the Plan are achieved. This regulation is promulgated in furtherance of these statutory requirements.

Section 601(h)(4) of WRDA 2000 describes the project specific assurance requirements for Project Implementation Reports, Project Cooperation Agreements, and Operating Manuals. Finally, section 601(h)(5) contains a savings clause that provides protection for existing legal sources of water that will be eliminated or transferred due to project implementation and provides for maintenance of the levels of service for flood protection that were in existence on the date of enactment of WRDA 2000 and in accordance with applicable law.

II. Process for Developing the Programmatic Regulations

The Department of the Army developed the programmatic regulations through an open and inclusive process that involved numerous meetings, briefings, and discussions with other Federal, State, and local agencies; the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida; agricultural, environmental, urban utilities, recreational, and urban interest groups; and the public. Briefings on the programmatic regulations were provided to the Governing Board of the South Florida Water Management District and its Water Resources Advisory Commission and the South Florida Ecosystem Restoration Task Force and its Working Group. In addition, programmatic regulations web pages were developed and posted on the Comprehensive Everglades Restoration Plan web site (www.evergladesplan.org). The web site was used to disseminate information about the programmatic regulations and to provide a place for individuals and organizations to submit comments electronically during the development of the programmatic regulations. This was designed to identify the major concerns of the agencies and various groups, prior to publishing the proposed regulations and soliciting formal public comment.

The Army held an opening round of meetings with agencies, interest groups,

and the public in May and June 2001. The purpose of these meetings was to discuss the process that would be used to develop the programmatic regulations and to solicit comments on the major issues and concerns that should be addressed in developing the regulations.

Following this initial round of meetings, the Army developed a draft outline of the programmatic regulations. We then held a second round of meetings in September and October 2001 with agencies, interest groups, and the public to solicit comments on the outline. We also consulted with the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida, and sought their comments on the draft outline.

After the second round of meetings, we developed an initial draft of the programmatic regulations. We distributed this initial draft to the public on December 28, 2001, and allowed informal public comment until February 15, 2002. We then held meetings with agencies, tribes, and interest groups, to discuss the initial draft. We also received written comments on the initial draft that were posted on the programmatic regulations web site. In addition, the Water Resources Advisory Commission formed a subcommittee on the programmatic regulations. The subcommittee met several times to discuss issues concerning the initial draft and potential ways of addressing these issues. The South Florida Ecosystem Restoration Task Force also met several times after the release of the initial draft to discuss the programmatic regulations.

The proposed rule was published in the **Federal Register** on August 2, 2002 and the public was allowed to submit comments on the regulations until October 1, 2002. During the comment period, we held a public meeting in Miami on September 10, 2002 and a public meeting in West Palm Beach on September 19, 2002. We also consulted with the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida and held a number of informal meetings with interested groups. The comments submitted on the proposed rule and the transcripts of the two public meetings were posted on the programmatic regulations web site after the close of the public comment period.

On February 6, 2003, the Council for Environmental Quality hosted a public meeting in Washington. The purpose of the public meeting, which was facilitated by the Council on Environmental Quality, was to provide an opportunity for interested parties to clarify comments filed on the proposed rule. Representatives of the Department

of the Army, the Department of the Interior, and the State, as well as representatives of other Federal agencies were in attendance to listen to these views. Additionally, the meeting afforded attendees an opportunity to engage directly with each other. This open dialogue was especially useful in developing a thorough understanding of the parties' views.

This final rule was developed after considering all of the information received at the meetings, as well as written comments that were received from agencies, interest groups, and the public.

III. Discussion of Final Rule

We received approximately 820 comments on the proposed regulations issued on August 2, 2002. Of these comments, approximately 800 were individual or form letters from the public. In general, these letters requested that the proposed regulations be revised to: give the Department of the Interior a greater voice in approving CERP documents and participating in RECOVER; to strengthen the independence of the independent scientific review panel to ensure that its reviews are objective, and to incorporate the interim goals in the final regulations. We also received approximately 25 letters from various types of organizations, members of Congress, Federal, State, and local agencies, the Miccosukee Tribe of Indians of Florida, and the Seminole Tribe of Florida. These letters included detailed comments on the recommendations and specific proposals for revisions in a number of areas.

All of the comments were generally supportive of the effort to issue final regulations. We have carefully considered all of these comments in developing today's final rule. The following paragraphs include a description of the significant issues raised by these comments and a discussion of how these issues were addressed in the final regulations. In reviewing these comments, we sought to reconcile different points of view and to find consensus solutions to common concerns. In a few instances this was not possible because the parties simply held diametrically opposing views. In these instances, our decisions on proposed revisions were guided by our judgment as to what would best fulfill Congressional intent with respect to the goals and purposes of CERP. The final rule remains similar to the proposed rule in organization and structure, but contains the substantive and editorial changes that were made to address the

issues raised by the comments. The Army is confident that these final programmatic regulations provide an excellent framework for the implementation of CERP as envisioned by Congress.

IV. Discussion of Comments

A. Amount of Detail in the Proposed Regulations

A number of commenters shared their views on the appropriate level of detail that should be contained in the regulations. Some commenters believed that the programmatic regulations should be very detailed and directive in terms of specific procedures and outcomes. Others believed that the programmatic regulations should be process-oriented and provide a general framework for implementing CERP. A few of these commenters also expressed concern that the Federal regulations not infringe on the sovereignty of the State of Florida or its right to allocate its water resources. Others sought to ensure that the regulations safeguard the Federal interest and investment in restoration, preservation, and protection of the South Florida ecosystem, including Federal properties within South Florida, such as national parks and wildlife refuges.

The final regulations attempt to recognize these diverse views. We made a number of changes to the proposed rule in order to clarify the procedures and processes specified in the regulations to ensure that the goals and purposes of the Plan are achieved. As in the proposed rule, the final regulations also call for the development of detailed guidance memoranda in the future to specifically address issues of system-wide import. In striking a balance between process and specificity, we strove to address those matters that could be specifically dealt with now while avoiding being so prescriptive that we would lose the flexibility to respond to new technical and scientific information revealed during implementation of the Plan.

B. Guidance Memoranda

A number of commenters raised concerns about the guidance memoranda described in the proposed regulations. These concerns varied but, in general, related to either the substantive matters addressed in the guidance memoranda or the process for finalizing the guidance memoranda. Some commenters felt that the concurrence provisions contained in the proposed regulations would delay finalizing the guidance memoranda. Others felt that the concurrence

provisions in the proposed regulations did not give the Secretary of the Interior or the Governor of Florida an appropriate role in approving the guidance memoranda because it appeared that the Secretary of the Army could finalize these documents after giving good faith consideration to comments from the Department of the Interior and the Governor, notwithstanding the fact that either or both officials had concerns about finalizing the regulations.

Some commenters believed that the scheduled completion dates for developing the guidance memoranda were unrealistic and should be changed. Others expressed the view that issues addressed in the guidance memoranda should be covered in the programmatic regulations. In addition, they were concerned that the guidance memoranda did not have the same legal status as the programmatic regulations and thus would not have the same legal import. These commenters stated that if the material intended for inclusion in the guidance memoranda was not included in the final rule then the guidance memoranda should be included in the programmatic regulations at the next revision. Several commenters also believed that the proposed regulations gave an inappropriate role to the South Florida Water Management District in the development of the guidance memoranda. One commenter requested that an additional guidance memorandum be developed to provide a procedure for determining if implementation of a project will cause the elimination or transfer of existing legal sources of water. The Seminole Tribe commented that "existing legal source" of water is a new concept not found in Florida statutes or regulations. The Tribe requested that the programmatic regulations set up a process for defining "existing legal source" of water and addressing how an "existing legal source" of water would be replaced to comply with the savings clause.

The comments reflected a difference of opinion with respect to whether certain issues should be addressed in the guidance memoranda or the programmatic regulations and whether the Department of the Interior and the Governor of Florida should have concurrence over the guidance memoranda, as they do with regard to the programmatic regulations. Some of the commenters believe that the issues that are proposed for discussion in the guidance memoranda should be included in the regulations because they cover processes and matters of system-

wide applicability. Alternatively, they believe that if guidance memoranda must be developed, they should later be incorporated into the regulations. These commenters believe that for these reasons the Secretary of the Interior and the State of Florida should have a concurrence right in the guidance memoranda regardless of whether the guidance memoranda are included in the regulations. Other commenters expressed the view that guidance memoranda should not be included in the regulations because they address technical or detailed matters instead of the system-wide procedural matters Congress intended would be addressed in the programmatic regulations. These commenters believed that it would be inappropriate to give the Secretary of the Interior and the Governor of Florida a concurrence right over these documents because the statute authorizing CERP provides for concurrence in the programmatic regulations only.

The final regulations contain revisions in response to these comments. In attempting to address the views of those who commented that the Secretary of the Interior and Governor of Florida should be given a greater role in the development of the guidance memoranda and that the South Florida Water Management District had an inappropriate role in developing the guidance memoranda, the final rule clarifies that the South Florida Water Management District and the Corps of Engineers work together in developing the guidance memoranda but the final approval is by the Secretary of the Army, after public notice and comment and with the concurrence of the Secretary of the Interior and the Governor of Florida. We believe that this change in the regulations assures that the South Florida Water Management District plays an important role in the development of the guidance memorandum, but preserves the ability of the Secretary of the Army to make a final decision on the guidance memorandum with the concurrence of the Secretary of the Interior and the Governor.

The approval process for the guidance memoranda parallels the statutory concurrence process for the programmatic regulations. We deleted the language in the proposed regulations that said the Army would give "good faith consideration" to the concurrence or non-concurrence statements of the Secretary of the Interior and the Governor before approving the guidance memoranda. Our intent is to issue guidance memoranda that have been concurred in by the Secretary of the

Interior and the Governor. We agree that the old language in the proposed regulations did not communicate adequately this intent. Instead, it suggested that the Army simply had to fulfill a ministerial coordination requirement by asking the Secretary of the Interior and the Governor whether they concurred or non-concurred in the guidance memorandum. This language did not convey the Army's intent to actively seek the concurrence of the Secretary of the Interior and the Governor prior to approving the guidance memoranda. The new language gives the Secretary of the Interior and the Governor the same concurrence opportunity they have on the programmatic regulations and assures that they have an appropriate role in the Department of the Army's adoption of these important documents. While concurrence or non-concurrence on the six guidance memoranda in § 385.5(b) is not required by law and will require additional time to fulfill, we believe it is appropriate to provide for this process because of the significance of these documents.

We believe that the public should have an opportunity to review and comment on the guidance memoranda because of their significance. Accordingly, the final regulations state that the public will be advised by notice in the **Federal Register** when the guidance memoranda are ready for review and comment. The final rule requires that the guidance memoranda should be developed within a year of the effective date of the programmatic regulations with the concurrence of the Secretary of the Interior and the Governor.

We have determined that the guidance memoranda should not be included in the programmatic regulations at this time for several reasons. First, they are still being developed, second, they will be very technical, and third, they will provide internal guidance to the agencies implementing CERP. This decision is consistent with the view of commenters who felt that including the guidance memoranda in the programmatic regulations was incompatible with structured, formal rule-making processes. These commenters felt that rulemaking processes would not accommodate recurring revisions to published technical documents, like the guidance memoranda, which will require periodic changes to accommodate new information. These commenters were concerned that if guidance memoranda were included in these regulations, every revision of them would require us to initiate a

rulemaking process. While we determined that the guidance memoranda should not be included in the programmatic regulations at this time, we preserve the opportunity to include the guidance memoranda in the programmatic regulations during the next review and revision of the programmatic regulations.

The final regulations no longer contemplate that a separate guidance memorandum will be developed for the system-wide evaluation of Project Implementation Report alternatives by RECOVER. We concluded that this subject should be addressed in the guidance memorandum for the formulation and evaluation of alternatives for Project Implementation Reports and that a separate guidance memorandum on this subject was unnecessary.

The final regulations also require the development of an additional guidance memorandum that will be used by agency personnel to identify if an elimination or transfer of "existing legal sources of water" will occur as a result of implementation of the Plan. This guidance memorandum will ensure the fulfillment of the savings clause requirements of section 601 (h)(5)(a) of WRDA 2000 that are designed to ensure that "existing legal sources of water" are preserved. There was general agreement among commenters that a definition is required for the phrase, "existing legal sources of water" but there was wide disagreement among the commenters about what the phrase actually means or who determines what an "existing legal source of water" is. The term is not defined in WRDA 2000 or elsewhere in Federal or Florida State law. Some commenters felt the term should include all water in the South Florida ecosystem that was not discharged to tide at the time WRDA 2000 was enacted. Other commenters emphasized that the term used in the statute, "existing legal sources" is a broad term which indicates that all water in the South Florida ecosystem should be covered by the requirements of the savings clause. Several commenters felt that the determination of what constitutes an "existing legal source of water" is not a decision for the Secretary of the Army to make. They argued that the Secretary of the Army should defer to the State of Florida on this issue because the determination of what constitutes an existing legal source of water involves a matter of state law. The new guidance memorandum contemplated in the regulations will establish procedures for identifying what constitutes "an existing legal source of water" and for determining

when an existing legal source of water has been eliminated or transferred.

C. Goals and Purposes of the Plan

The comments reflected different views on the goals and purposes of the Plan. A number of commenters felt the proposed regulations did not place enough emphasis on the restoration objectives of the Plan and recommended that the regulations be revised to clearly state that the restoration objectives of the Plan are a priority. Another commenter believed that the language in the proposed regulations concerning the goals and purposes of the Plan was vague. This commenter suggested that the language be replaced with the description of the goals and objectives of the Plan contained in the April 1999 "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement." Finally, several commenters believed that the regulation should include all of the goals and purposes of the Plan, including providing for other water-related needs of the region.

To respond to these comments we have included a definition of the goals and purposes of the Plan in the final regulations that follows the language of WRDA 2000. This definition specifies that the overarching goal of the Plan is the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection. We believe the open and collaborative process set forth in these regulations for the implementation of the Plan provides the greatest assurance that all the goals and the purposes of the Plan will be achieved. This regulation emulates the successful, open and collaborative process that produced the Comprehensive Everglades Restoration Plan and we are confident that these same processes will ensure that the goals and purposes of the Plan are fulfilled as intended by Congress.

Several commenters also expressed the view that the proposed regulations should not have tied performance of the Plan, and particularly the development of interim goals, to the model run identified as D-13R in the April 1999 "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement." These commenters maintained that implementation modeling conducted after completion of the feasibility report demonstrated the potential for improving the Plan with regard to the restoration of the ecosystem.

We have removed the references to D-13R in the final regulations because we agree that it may be possible to produce

ecosystem restoration benefits beyond those contemplated in D-13R. We will further evaluate the performance of the Plan in accordance with the adaptive management provisions of the regulations to determine whether it is possible to realize any improvements in the performance of the Plan with regard to ecosystem restoration while providing for other water-related needs of the region. We will make adjustments to the Plan to the extent these improvements can be realized consistent with the overall goals and purposes of the Plan. As indicated, we have deleted the reference to D-13R in the hope that it may be possible to improve the Plan's performance with respect to ecosystem restoration consistent with the statutory and budgetary framework approved by Congress.

D. Defining Restoration

Several commenters expressed concern about the definition of restoration contained in the proposed regulations. Some commenters felt that restoration should be defined in terms of hydrologic and ecologic targets, not the level of performance contained in the April 1999 Final Integrated Feasibility Report and Programmatic Environmental Impact Statement" as was contemplated in the proposed regulations. They believe that implementing the Plan in accordance with hydrologic and ecologic targets, and making adjustments as necessary through adaptive management, is a more effective way to ensure that system-wide restoration occurs. In particular, the Everglades Coalition commented that, " * * * the yellow book provides only a framework for restoration, and does not clearly describe the essential ecological characteristics of a sustainable restored Everglades. * * * It is necessary to keep the definition of restoration * * * based on ecological necessity and not anticipated performance. This structure is necessary for the adaptive management process to be successful in making meaningful improvements to the plan." Another commenter stated that the definition of restoration must clearly specify that restoration is "an absolute priority above all others."

Other commenters expressed the view that the definition of restoration must take into account certain relevant provisions of WRDA 2000. These commenters point out that the purpose of the Plan was not to provide for the restoration of the South Florida ecosystem without regard to other considerations. They note that restoration is not an open-ended abstract term; WRDA 2000 states that

the Plan must take into account "the other water-related needs of the region," and contains a prohibition against eliminating or transferring "existing legal sources of water" until new sources of water of comparable quantity and quality are available to replace the water that is lost as a result of implementation of the Plan. These commenters pointed out that the definition of restoration must recognize that Congress authorized the Plan as a framework for restoring the South Florida ecosystem and that the restoration that actually occurs is a result of the specific projects that Congress later authorizes in fulfillment of the Plan.

Other commenters believed that the definition should recognize the important role that "getting the water right" plays in restoration. Getting the water right involves delivering water to the ecosystem in the right quantity and quality at the right time and place. Another commenter held a somewhat similar view, believing that the definition should emphasize the importance of hydroperiod and water quality in fulfilling the restoration objective since natural system conditions are a result of water quality and hydroperiod conditions.

Other commenters expressed the view that the definition of restoration in the proposed regulations was not scientifically credible. These commenters believed that to be credible from a scientific perspective, the definition of restoration must take into account other considerations that are relevant to the ecological condition of the South Florida ecosystem. For example, state and local restoration and water quality programs affect the South Florida ecosystem as well. Additionally, some commenters pointed out that there is no consensus among scientists about the specific ecological parameters that constitute successful "restoration." As an example, there is no agreement on what the goal should be for the population of specific species of plants, fish, or birds.

To some extent, the disagreement surrounding the definition of restoration reflects the underlying concern of affected parties that the definition of restoration will not take their interests into account. Certain parties are concerned that if the definition of restoration does not assign a proper role to science in fulfilling the objectives of the Plan, the implementation of the Plan will be driven by political compromises. These parties are concerned that as Federal and State governments move forward with implementation of the Plan, the restoration goals of the Plan

will be preempted by water supply and flood protection needs. In this regard, the Natural Resources Defense Council urged that the programmatic regulations must "preclude the achievement of water supply and flood protection goals at the expense of restoration goals." Other commenters are concerned that the other water-related goals of the region will be ignored in an effort to advance an elusive and constantly changing vision of restoration favored by scientists, instead of the Plan approved by Congress. All commenters emphasized the importance of developing an appropriate definition of restoration so that CERP projects are properly sequenced and appropriations wisely spent.

The final regulations contain a new definition of restoration that responds to these comments. The regulations define restoration as the recovery and protection of the South Florida ecosystem so that it once again achieves and sustains the essential hydrological and biological characteristics that defined this ecosystem in an undisturbed condition. This definition acknowledges that, as authorized by Congress, the restored South Florida ecosystem will be significantly healthier than the current system but will be smaller and somewhat differently arranged than the historic ecosystem. Also, there may be different degrees of restoration in different areas of the ecosystem. The irreversible physical changes made to the South Florida ecosystem make a complete return to the historic ecosystem impossible. However, the restored ecosystem will have recovered those essential hydrological and biological characteristics that defined the undisturbed South Florida ecosystem and made it unique among the world's wetlands systems.

The new definition of restoration recognizes that the restoration goal of the Plan is to achieve a healthy and functioning ecosystem that once again exhibits the essential characteristics of the undisturbed South Florida ecosystem. The definition acknowledges that, as authorized by Congress, the restored ecosystem will be different than the historic ecosystem. In so doing, the definition affords flexibility to allow for adaptive management and the accommodation of other water-related needs of the region, as the Plan is implemented through individual projects specifically authorized by Congress.

The definition of restoration recognizes implicitly that science will be the foundation of restoration, but it also assumes, as noted throughout the

programmatic regulations, that in all phases of implementation of the Plan both restoration and the other goals and purposes of the Plan should be achieved. The definition also recognizes that we must act within the legislative framework that has been approved by Congress in WRDA 2000 and later may be approved by Congress in future authorization acts.

E. Amount of Water Provided for Restoration

Some commenters expressed the view that the regulations must include a statement that new water generated by the Plan will be reserved for the natural system on an 80%–20% basis. These commenters note that the report of the Senate Committee on Environment and Public Works on WRDA 2000 (Senate Report No. 106–362) states:

The Plan contains a general outline of the quantities of water to be produced by each project. According to the Army Corps, 80 percent of the water generated by the Plan is needed for the natural system in order to attain restoration goals, and 20 percent of the water generated for use in the human environment. * * * Subject to future authorizations by Congress, the committee fully expects that the water necessary for restoration, *currently estimated* at 80 percent of the water generated by the Plan, will be reserved or allocated for the benefit of the natural system (Emphasis added).

These commenters believed that the 80%–20% ratio should be set forth in the regulations as a generalized planning goal for reserving or allocating new water to the natural system. They are concerned that the 80%–20% ratio was not identified in the proposed regulations as a planning goal. On a different but related note, several commenters felt that a water budget should be developed for the South Florida ecosystem to ensure that the restoration goals of the Plan are achieved.

Other commenters observed that the 80%–20% ratio was merely the initial estimate of the new water that would be produced by the Plan and therefore, could be allocated or reserved for the benefit of the natural system. These commenters maintain that the goal of the Plan is to provide whatever water is needed for restoration of the natural system, irrespective of the 80%–20% ratio. These commenters point out that individual components of the Plan may produce amounts of water different from this initial estimate. In fact, some commenters pointed out that the 80%–20% ratio was part of a scenario called D–13R4, which was not included in the framework Plan (D–13R) authorized by Congress.

We understand the desire of the commenters to assure sufficient water will be allocated or reserved for the benefit of the natural system. To accomplish this result, we believe that it is necessary to preserve the ability to adapt to new information as the Plan is implemented. Therefore, the regulations do not contemplate the allocation of water on a rigid 80%–20% basis, either system-wide or project-by-project. Instead, the final regulations ensure that adequate water will be allocated or reserved for the benefit of the natural system without regard to this ratio by requiring that each Project Implementation Report evaluate and identify water to be reserved for the natural system and made available for other water-related needs of the region, and that the Plan itself be continually evaluated through adaptive management to assure that adequate water is allocated or reserved on a system-wide basis.

The final rule also provides that the Corps of Engineers and the South Florida Water Management District will determine the total quantity of water that is expected to be generated by implementation of the Plan, including the quantity expected to be generated for the natural system to attain restoration goals as well as the quantity expected to be generated for use in the human environment, and will periodically update that estimate, as appropriate, based upon changed or unforeseen circumstances, new scientific and technical information, new or updated modeling, and congressionally authorized projects or modifications to the Plan. In addition, the final regulations envision that a water budget for the Plan will be developed and disseminated annually to the public. These regulatory provisions will ensure that adequate water will be reserved or allocated to the natural system as intended by Congress.

F. Independent Scientific Review and External Peer Review

A number of commenters were concerned that the proposed regulations did not provide for the establishment of an independent scientific review panel. They noted that section 601(j) of WRDA 2000 requires that the Secretary of the Army, the Secretary of the Interior, and the Governor, in cooperation with the Task Force establish an independent scientific review panel convened by a body, such as the National Academy of Sciences, to review the Plan's progress toward achieving the natural system restoration goals of the Plan. These commenters feel that the panel must operate independently of the Corps of

Engineers, the State, and the Department of the Interior and believe that the programmatic regulations should address how the implementing agencies would work with the panel. One commenter also felt that the proposed regulations did not provide an appropriate role for the Task Force in the establishment of the independent scientific review panel.

The Department of the Army embraces the use of independent scientific review and external peer review. The successful implementation of CERP requires that appropriate decisions be made about significant scientific and technical issues. These extremely technical, often controversial, issues will be presented in various reports and documents generated by numerous sources, including the Corps of Engineers, the South Florida Water Management District, Everglades National Park, the Fish and Wildlife Service, the Florida Fish and Wildlife Conservation Commission, and various Federal, State, and local agencies. Independent scientific review and external peer review will ensure that the decisions made in implementing CERP are based on appropriate data and sound science that is clearly presented to decision makers.

There was some confusion evident in comments and public meetings regarding the panel that will be established to perform the section 601(j) functions and other independent scientific review, particularly the standing panel currently used by the South Florida Ecosystem Restoration Task Force (Task Force). In February 1999, the Task Force endorsed "the establishment of an ongoing outside scientific review panel * * * as an essential component to ensure an effective adaptive management process for South Florida Ecosystem restoration." In September 1999, in fulfillment of the Task Force's resolution, the Department of the Interior entered into a five-year cooperative agreement with the National Academy of Sciences (NAS) to establish the Committee on Restoration of the Greater Everglades Ecosystem (CROGEE). CROGEE provides scientific advice to the Task Force and its member agencies and that the Committee will review and make recommendations on the scientific and technical aspects and elements relating to the South Florida ecosystem.

The section 601(j) panel will be independent of CROGEE or any other panel. Its only mission will be to carry out section 601(j).

Acting on a proposal from the Department of the Army, the Secretary

of the Army, the Secretary of the Interior, and the Governor, in consultation with the South Florida Ecosystem Restoration Task Force, agreed to designate the National Academy of Sciences to convene the initial independent scientific panel that will perform the tasks required by Section 601(j) of the Water Resources Development Act of 2000. The final regulations contain new language that identifies the National Academy of Sciences as the entity that will convene the initial independent scientific review panel. These regulations also acknowledge that the South Florida Ecosystem Restoration Task Force has played a role in choosing the National Academy of Science as the initial organization to convene the panel, and the Task Force will play a role in the establishment of the panel. The final regulations state that we will enter into an agreement with the National Academy of Sciences to convene the independent scientific review panel. This agreement shall be for a period of five years with options for extensions in five-year increments. The final regulations include a statement recognizing that independent scientific review is crucial for ensuring that the best available science is used in the implementation of the Plan. The regulations recognize the continuing role of the Task Force to consult on decisions to exercise the option to extend the agreement. The regulations recognize the continuing role of the Task Force in designation of the organization to convene future panels and to consult on establishment of the panel upon expiration of the initial agreement.

The final regulations state that the Secretary of the Army, the Secretary of the Interior, and the Governor shall finalize any agreements and procedures necessary to provide for the operation and funding of the independent scientific review panel and establish this panel within six months of the effective date of the programmatic regulations.

The final regulations set forth the expectation that the National Academy of Sciences will use established practices for assuring the independence of members and that the review panel will include members reflecting a balance of the knowledge, training, and experience suitable to comprehensively review and assess the Plan's progress towards achieving restoration goals. WRDA 2000 provides very specific direction that the panel is "to review the Plan's progress toward achieving the natural system restoration goals of the Plan." This specific requirement will be

the focus of the agreement and the mission of the independent scientific review panel. The independent panel's tasks include those activities that are necessary to review the Plan's progress towards achieving the restoration goals of the Plan. In addition, in accordance with WRDA 2000, the panel will produce a biennial report to Congress, the Secretary of the Army, the Secretary of the Interior, and the Governor that includes an assessment of ecological indicators and other measures of progress in restoring the ecology of the natural system, based on the Plan.

To further insure the independence of the panel, the regulations provide that the panel will not be assigned, and may not accept, other tasks, nor may it provide advice on other matters to any entity, public or private. Its sole mission is to review the Plan's progress toward achieving the natural system restoration goals of the Plan and to produce the section 601(j) report.

The final regulations provide that the agreement with the section 601(j) panel will specifically recognize that the agencies may provide for other independent scientific panels and peer review to address specific scientific or technical questions. The regulations provide for an external peer review process to review documents, reports, procedures, or to address specific scientific or technical questions or issues. Draft Pilot Project Technical Reports and draft assessment reports are specifically designated to be externally peer reviewed.

G. Restoration Coordination and Verification (RECOVER)

Many comments focused on the role of RECOVER in implementing the Plan. Some of the commenters felt that the responsibilities of RECOVER were not clearly identified in the proposed regulations. They suggested that these responsibilities should be organized according to three major missions "assessment, evaluation, and planning. Another commenter felt the final regulations should clearly state that RECOVER is not an independent body but that it is instead an interagency group that prepares work products for consideration by others. Some commenters believe that the final regulation should emphasize that RECOVER is composed of agency personnel with scientific expertise. Several commenters believed that the Department of the Interior should have a co-leadership role over RECOVER along with the Corps of Engineers and the South Florida Water Management District.

RECOVER's origins trace back to the April 1999 "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement." RECOVER is an interdisciplinary, interagency scientific and technical team that was designed to perform system-wide analyses. In reviewing the comments on the proposed regulations, we felt that some misunderstanding might exist concerning the role of RECOVER. For example, some commenters suggested that RECOVER should be an independent body because independent science plays an important role in implementing the Plan. While RECOVER is a science-based group because many of its members possess scientific expertise, it is not an independent agency. It is an interagency group consisting of members from governmental entities. The role of RECOVER is to promote an integrated view within the implementing agencies on matters relevant to the implementation of the Plan in order to ensure that the goals and purposes of the Plan are achieved. Independent scientific research will be used to gain perspectives on these issues from outside parties and will be provided by entities other than RECOVER.

The final regulations recognize that RECOVER is an existing, presently functioning interagency team. The final regulations are consistent with the description of RECOVER in the Plan and envision that RECOVER will play an important role in ensuring that a system-wide perspective is applied and that the best available scientific and technical information is used during the development, implementation, and evaluation of the Plan. The final regulations address a number of issues. They recognize that the Corps of Engineers and the South Florida Water Management District will oversee the activities of RECOVER. The final regulations also identify the members of the RECOVER Leadership Group, which includes the program managers from the Corps of Engineers and the South Florida Water Management District, the Environmental Protection Agency, the National Oceanic and Atmospheric Administration, the U.S. Fish and Wildlife Service, the U.S. Geological Survey, Everglades National Park, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Agriculture and Consumer Services, the Florida Department of Environmental Protection, and the Florida Fish and Wildlife Conservation Commission. The diverse membership of the Leadership Group assures that the views of Federal

agencies, State agencies, and Tribes are appropriately represented. The final regulations outline a series of specific scientific and technical duties RECOVER will perform to assist the Corps of Engineers and the non-Federal sponsors in achieving the goals and purposes of the Plan, particularly restoration of the natural system. We have grouped these duties under the three major missions of RECOVER—assessment, evaluation, and planning/integration activities.

Again, the final regulations indicate that RECOVER is an interagency, interdisciplinary, scientific and technical team. The regulations state that the documents prepared by RECOVER are to be provided to the Corps of Engineers and the South Florida Water Management District for consideration as they carry out their responsibilities in implementing the Plan. The regulations specify that the Corps of Engineers and the SFWMD will consult with other Federal agencies, state agencies, local agencies and Tribes, as they consider the information that is provided by RECOVER.

Several commenters expressed the view that RECOVER is an advisory body that is subject to the Federal Advisory Committee Act (FACA). We concluded that FACA does not apply to RECOVER. FACA contains an exception for meetings "held exclusively between Federal officials and elected officers of State, local, and tribal governments," where those meetings "are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration." Unfunded Mandates Act, Public Law 104-4, 109 Stat. 48, 65 (1995), 2 U.S.C. 1501, 1534 et seq. RECOVER's meetings and activities fall within this exception. Another commenter noted that FACA does not apply to the South Florida Ecosystem Restoration Task Force, pursuant to WRDA 1996 and proposed that RECOVER be made an advisory committee to the South Florida Ecosystem Restoration Task Force to avoid the application of FACA. Because we have determined FACA does not apply to RECOVER's meetings and activities, we do not believe this action is necessary.

H. Reservation or Allocation of Water for the Natural System

The provisions in the proposed regulations concerning the reservation or allocation of water for the natural system were of interest to a number of

parties. A brief discussion of the legislative foundation of these provisions proves helpful in understanding these comments.

The Plan authorized in WRDA 2000 is a framework plan designed to improve the distribution of water to the South Florida ecosystem. In accordance with section 601(f) of WRDA 2000, the Secretary of the Army, in coordination with the non-Federal sponsor, must prepare a Project Implementation Report before proceeding with an individual project that is included in the Plan. Section 601(h)(4)(A) of WRDA 2000 states that the Project Implementation Report must, among other items, identify the amount of water to be reserved or allocated for the natural system in order to provide for the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system, and comply with applicable water quality and permitting standards. Section 601(h)(4)(B)(2) of WRDA 2000 specifies that the reservation or allocation of water for the natural system will be implemented under State law and must be made before the Department of the Army can execute a Project Cooperation Agreement for a project.

Several commenters expressed concern about the process for verifying that a reservation or allocation of water for the natural system has been made under State law. One commenter believed that the regulations should clarify the process for determining reservations by establishing a restoration target of water to be reserved or established for each area of the ecosystem. Another commenter requested that the Corps of Engineers develop procedures for verifying that the reservation or allocation of water identified in the Project Implementation Report has been executed under State law. Two commenters believed that the requirement to amend the Project Cooperation Agreement (PCA) whenever the State revises the reservation limits the State's discretion to make appropriate reservations under State law. These commenters also believe that the requirement to revise the PCA is unnecessary as the State is required to make reservations that are consistent with the requirements of the President-Governor agreement of January 9, 2002, and that agreement is specifically enforceable in court. Both the State of Florida and the South Florida Water Management District expressed the view that in enacting WRDA 2000, Congress had not preempted State water law and that the programmatic regulations should not impede or interfere with Florida water law. Several commenters

were concerned that under the proposed regulations, changes to reservations or allocations of water could be made without the same congressional and public involvement that occurred for the initial reservation. Several Senators, while recognizing that reservations may need to be revised, expressed the view that because Congress approves projects based on a quantification of water, it also has a responsibility to ensure that when any change to a reservation of water occurs, that the Project Cooperation Agreement be changed to account for de minimus changes or changes consistent with the purposes of the Plan, or that the change be authorized by Congress.

Many commenters observed that the proposed regulations did not address the possibility that the actual performance of a project or project component might not meet the performance expected in the Project Implementation Report (PIR). As explained, WRDA 2000 requires that the Secretary not execute a Project Cooperation Agreement until a reservation or allocation of water for the natural system has been executed under State law. This raises the potential for problems under the provisions in WRDA 2000 that require sufficient reservations of water for the restoration of the natural system to be made under State law in accordance with the PIR for that project and provisions in the savings clause of WRDA 2000 that prohibit the elimination or transfer of existing legal sources of water. The problem arises if the actual performance of a project does not meet the projections of the water to be produced by the project or component laid out in the PIR. This led us to conclude that the final regulations must contain a discussion of what actions should be taken if a project or component does not perform as expected. This issue arises because the performance of a project or component will impact the reservation of the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system, and whether a new source of water supply of comparable quantity and quality has been provided to replace an existing legal source, as required by the savings clause. The amount of water identified in the PIR is only a projection and the actual amount of water produced by a project will only be known when the project has been operated. The proposed regulations also were designed not to interfere in the State reservation process while providing, consistent with Congressional intent, that the reservation remain consistent with the

agreements reached between the State and Federal government in the Project Cooperation Agreement.

The proposed regulations recognized that reservations or allocations of water are a State responsibility. We attempted to ensure that the purpose of CERP reservations were met in the final regulations by requiring that the Project Cooperation Agreement include a finding that the required reservation has been made before execution of a Project Cooperation Agreement and by providing that the parties execute an amendment to the agreement if there is a change in the reservations. The final regulations also specify that "State law" includes reservations or allocations of water made by the South Florida Water Management District or the Florida Department of Environmental Protection under authority of Florida law. The intent was to preserve the State's control over its reservation and allocation process while also protecting the Federal interest in proceeding with the project only if adequate water had been reserved for the natural system.

In order to clarify our process and provide further assurances to concerned parties, the final regulations include provisions which state that prior to the execution of the Project Cooperation Agreement, the District Engineer will verify that the initial reservation has been made by the State, and that the District Engineer's verification will be referred to in the Project Cooperation Agreement and made available to the public. This provision is consistent with the right of third parties to enforce the reservation provisions of the President-Governor agreement of January 9, 2002. The final regulations retain the provision in the proposed regulations that reservations or allocations of water are a State responsibility and that any change to the reservation or allocation of water for the natural system made under State law will require an amendment to the Project Cooperation Agreement. The final regulations also retain the provision in the proposed regulations that the District Engineer will, in consultation with other agencies and the Tribes, make a determination, after considering any changed circumstances or new information since completion of the PIR, that the revised reservation or allocation continues to provide for an appropriate quantity, timing, and distribution of water dedicated and managed for the natural system and satisfies the requirements of the project-specific assurances of CERP.

The final regulations also provide that the Secretary of the Army will notify the appropriate committees of Congress if a change in reservation is made after

approval of the PIR. The Secretary's and the State's reasons for changing the reservation and information about any new or changed circumstances will also be provided to Congress. This provision will assist Congressional oversight of any project, and its oversight of the integrity of the reservation process.

We feel that these measures provide adequate assurances that the requirements of WRDA 2000 will be followed while not infringing upon the authority of the State of Florida. The open process also ensures both government and public oversight.

I. Interim Goals

Many comments focused on development of the interim goals. As background, section 601(h)(3)(c)(i)(III) of WRDA 2000 requires that the "Programmatic regulations * * * establish a process * * * to ensure the protection of the natural system consistent with the goals and purposes of the Plan, including the establishment of interim goals to provide a means by which the restoration success of the Plan may be evaluated throughout the implementation process." Interim goals provide a means of tracking restoration performance and for periodically evaluating the accuracy of predictions of system responses to the effects of the Plan. Progress towards meeting the interim goals is to be reported to Congress as part of the periodic reports required by WRDA 2000.

There was universal agreement among agencies, tribes, interest groups, and the public that interim goals will be useful for measuring the restoration success of the Plan; however, there was disagreement about whether the interim goals should be included in the final programmatic regulations. Some commenters believed that WRDA 2000 required that the interim goals be included in the programmatic regulations. In contrast, other commenters maintained that WRDA 2000 merely required that the regulations develop "a process" for establishing interim goals, and did not require that the goals themselves be in the regulations. Other commenters expressed views that did not relate to statutory considerations. Some of these commenters believed that it was important to include the interim goals in the programmatic regulations to give them appropriate visibility and to ensure that the interim goals are actually met. These commenters also believed that including the interim goals in the regulations would have the additional benefit of enabling the public to take part in the process of establishing the goals. Another group of

commenters realized that we could not include the interim goals in the regulations now but urged that they be made a part of the regulations at a later time. In this regard, five Senators wrote: "We understand that the interim goals will not be ready to include in the regulations before they are finalized, but we urge the Corps to include these goals when they are established rather than relegating them to guidance documents." Two Congressmen commented that the final rule should provide for "adoption of interim restoration goals once the programmatic regulations are completed."

Other comments maintained that interim goals should not be included in the programmatic regulations. Some pointed out that the Plan incorporates adaptive management, continuously assessing and adapting to new information and circumstances. They believe that incorporating fixed goals into regulations is inconsistent with adaptive management. Some commenters maintain that the rulemaking process is structured and cumbersome and that it is impractical to establish and amend interim goals through such a time-consuming process. These commenters believe that placing the interim goals in the programmatic regulations would delay the process of adopting and amending the goals, which is inconsistent with the concept of adaptive management. Other commenters were also concerned with delays but their concerns relate to identifying the interim goals in an Interim Goals Agreement independent of the regulations and making this agreement subject to the concurrence of the Secretary of the Interior and the Governor. These commenters maintain that the statute only grants the Secretary of the Interior and the Governor a concurrence right in the programmatic regulations and extending this right to the Interim Goals Agreement will simply cause delays.

In reviewing the comments, it was apparent that there was significant disagreement on exactly what the interim goals should be. One commenter observed that the interim goals should not include ecological goals as that could subvert the hydrological basis for the Plan. Most commenters who maintained that interim goals must be included in the regulations did not give examples or provide descriptions of the interim goals. Even those who thought that interim goals should be included in the final regulations recognized that additional time was required to perform more modeling related to the interim goals. These commenters understood the importance of modeling in

establishing interim goals that are an effective measure of the Plan's progress toward restoration. A number of commenters, including the Miccosukee Tribe of Indians of Florida, expressed a desire to review and comment on the interim goals before they are set forth in the Interim Goals Agreement.

As a threshold matter, we think it is important to acknowledge the significance of the interim goals. The interim goals provide the yardstick that will measure the success of the restoration effort. It will not be possible to fairly measure the success or failure of the Plan without appropriate interim goals. The final regulations establish principles that will guide the development of the interim goals and the execution of the Interim Goals Agreement discussed in § 385.38(a). These principles will appropriately involve Tribes, governmental interests and the public in the process. The regulations do not contain the specific interim goals because more time is needed to model them to satisfaction; therefore, the final regulations retain the concept of establishing the interim goals in an Interim Goals Agreement. The regulations provide that the public will have the opportunity to review and comment on the Interim Goals Agreement before the agreement is finalized. The regulation also makes clear that interim goals are targets for use by the agencies and Congress in evaluating the success of the restoration effort. They are not standards or schedules enforceable in court. The final regulations provide for the development and use of interim goals that include water quality and ecological indicators in addition to indicators characteristic of anticipated hydrological performance. These indicators will be helpful in making meaningful judgments about the performance of the Plan.

In order to address the concern that interim goals be given appropriate visibility, and to clarify the relationship between the interim goals and the programmatic regulations, the final regulations also contain a new section, 385.1(c), that clarifies our interpretation of the statutory assurances provided for in section 601(h) of WRDA 2000 and how the processes, tools and enforcement mechanism established in this section of the Act constitute an integrated framework for assuring that the goals and purposes of the Plan are achieved. The section clarifies that the programmatic regulations provide a process for developing tools, including Project Implementation Reports, Project Cooperation Agreements, Operating Manuals, interim goals, and other tools

established in the regulations, which are used to guide the planning implementation and evaluation of the project. Section 601(h) also provides an enforcement mechanism, the Agreement between the President and the Governor, under which the State is to ensure, by regulation or other appropriate means, that water made available by each project in the Plan shall not be permitted for a consumptive use or otherwise made unavailable by the State until such time as sufficient reservations of water for the restoration of the natural system are made under State law in accordance with the project implementation report and consistent with the Plan. The President and the Governor signed this Agreement on January 9, 2002.

The new § 385.1(c) further directs the Secretary of the Army to ensure that the public understands the linkage between the process, tools, and enforcement mechanism and can monitor the effectiveness of this integrated framework in assuring that the goals and purposes of the Plan are achieved, as provided for in the programmatic regulations, by providing for public notice and comment in the development of the tools; providing notice of final action on tools; making available on the world-wide web or by other appropriate means final, and where appropriate draft, copies of all tools; and explaining through these regulations and by other appropriate means the process for developing the tools, the linkage between the process, tools and enforcement mechanism, and the means by which these elements constitute an integrated framework for assuring that the goals and purposes of the Plan are achieved.

The Restoration Coordination and Verification (RECOVER) team will use the principles set forth in the proposed regulations to develop and recommend by no later than six months after the effective date of the programmatic regulations, a set of interim goals for implementation of the Plan. This date was set in recognition of the completion dates for the pre-CERP baseline and the Master Implementation Sequencing Plan. RECOVER has already begun work in order to meet the deadline.

The final regulations specify that the interim goals will identify improvements in quantity, timing, and distribution of water in five-year increments that begin in 2005, with the goals reflecting the results expected to be achieved by 2010 and for each five-year increment thereafter. As stated, the interim goals also will include indicators for water quality improvement and ecological responses,

such as increases in extent of wetlands, improvements in habitat quality, and improvements in native plant and animal abundance. While hydrologic interim goals will assess the Plan's success in restoring the hydrology of the region, we believe that the development and use of indicators for water quality improvement and ecological responses is necessary to assess the Plan's success in achieving the ultimate goal of restoration of a healthy ecosystem. The final regulations recognize that programs and activities that are independent of CERP may influence the achievement of improvements in water quality and desired ecological responses. The extent of the influence of these programs and activities should be assessed and described at the time goals are developed, and should be taken into account as the Plan is subsequently evaluated relative to its goals and purposes. In addition, the final regulations include specific water quality indicators for RECOVER to consider.

The final regulations envision that RECOVER will provide its recommendations to the Army Corps of Engineers, the South Florida Water Management District, and the Department of the Interior for consideration. A proposed Interim Goals Agreement shall be developed by the Secretary of the Army, the Secretary of the Interior and the Governor in consultation with the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Environmental Protection Agency, the Department of the Commerce, other Federal, State, and local agencies, and the South Florida Ecosystem Restoration Task Force. Interim goals will be memorialized in an agreement to be signed by the Secretary of the Army, the Secretary of the Interior, and the Governor of the State of Florida no later than one year after the effective date of the programmatic regulations. The Secretary of the Army will provide a notice of availability of the proposed agreement to the public in the **Federal Register**, seek public comments, and execute the final agreement with the Secretary of the Interior and the Governor.

As discussed previously, the final regulations do not envision that interim goals will be included in the programmatic regulations themselves. The regulations provide that the Department of the Army will memorialize the Interim Goals Agreement in appropriate Corps of Engineers guidance. However, the regulations do establish requirements that are triggered if the interim goals are not achieved as anticipated. If the

interim goals have not been met or are unlikely to be met, then the Corps of Engineers and the South Florida Water Management District must determine why the goals have not been met or are unlikely to be met and either initiate adaptive management actions to achieve the interim goals as soon as practical, consistent with the purposes of the Plan and consistent with the interim targets, or recommend changes to the interim goals.

Finally, the final regulations establish a process for revising the interim goals in five-year increments or sooner, if appropriate, in light of new information.

J. Interim Targets for Other Water-Related Needs of the Region

The overarching objective of the Plan is the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection. Identifying incremental targets for the other water-related needs of the region will help evaluate the success of implementation of the Plan in achieving the non-restoration goals of the Plan. The proposed regulations included provisions establishing a process for evaluating progress on meeting the other water-related needs of the region.

These provisions drew comments from several parties. One commenter suggested that the process for developing targets for other water-related needs of the region should closely parallel the process for developing the restoration-related interim goals. Two commenters believed that the date specified in the proposed regulations for RECOVER to provide recommendations on the targets should be extended because the targets are influenced by information that will be developed in connection with the pre-CERP baseline and the Master Implementation Sequencing Plan. One commenter expressed the view that the targets for other water-related needs should not be established before the adoption of the restoration-related interim goals. Other commenters were concerned that the proposed regulations did not address the question of how issues would be resolved if conflicts arise between achieving the interim goals and the targets for other water-related needs.

The final regulations provide that by not later than six months after the effective date of the programmatic regulations, RECOVER will recommend interim targets for the other water-related needs of the region, that are consistent with the interim goals. The

Secretary of the Army and the Governor, in consultation with others, including the South Florida Ecosystem Restoration Task Force, will develop the interim targets. RECOVER already has begun work in order to meet the deadline. The final regulations specify that the Secretary of the Army and the Governor will establish the targets within one year of the effective date of the programmatic regulations, but not prior to the execution of the Interim Goals Agreement. Like interim goals directed at evaluating the restoration success of the Plan, interim targets for other water-related needs of the region will be incorporated into appropriate agency guidance.

The final regulations retain the idea of drawing a distinction between interim goals, which are directed at evaluating the restoration success of the Plan, and interim targets for achieving the other water-related needs of the region. In the regulations, we use the term "interim" in front of the term "targets" to show that the interim targets for other water-related needs, which evaluate progress towards providing for these purposes, are parallel to the interim goals, which measure restoration success.

Like the provisions for interim goals, the final regulations specify that the interim targets will identify improvements in quantity, timing and distribution of water in five-year increments that begin in 2005, with the targets reflecting the results expected to be achieved by 2010 and for each five-year increment thereafter. The interim targets will include indicators for the frequency of water restrictions in various areas and the frequency of meeting salt-water intrusion protection criteria for different areas. Again, like the provisions for interim goals, the final regulations do establish requirements that are triggered if the interim targets are not achieved as anticipated. If the interim targets have not been met or are unlikely to be met, then the Corps of Engineers and the South Florida Water Management District must determine why the targets have not been met or are unlikely to be met and either initiate adaptive management actions to achieve the interim targets as soon as practical, consistent with the purposes of the Plan and consistent with the interim goals, or recommend changes to the interim targets.

Finally, the final regulations make clear that the interim targets are intended to facilitate inter-agency planning, monitoring, and assessment throughout the implementation process and are not standards or schedules enforceable in court.

K. Role of the Department of the Interior

Several commenters recommended that the Department of the Interior be given a more prominent role in implementation of the Plan because it administers significant lands and natural resources involved in the Plan. These commenters felt that the concurrence provisions in the proposed regulations diminished the role of the Department of the Interior envisioned in WRDA 2000. They felt that the concurrence provisions in the proposed regulations did not give the Secretary of the Interior an appropriate role in approving the guidance memoranda because the Secretary of the Army could finalize these documents after giving good faith consideration to comments from the Secretary of the Interior, notwithstanding the fact that the Secretary of the Interior might have concerns about finalizing the regulations. In addition, these commenters believe that the Department of the Interior should have a concurrence role on other programmatic decisions such as Comprehensive Plan Modification Reports, the Master Implementation Sequencing Plan, and System Operating Manual. Other commenters noted that the concurrence process in WRDA 2000 only extends to the programmatic regulations and that section 601(h)(3)(C)(ii) expressly prohibits the requirement for concurrence on Project Implementation Reports, Project Cooperation Agreements, Operating Manuals for individual projects, and other documents relating to the development, implementation, and management of individual features of the Plan unless concurrence is provided for in other laws. These commenters did not favor giving the Department of the Interior a greater role in implementing the Plan.

The final regulations give the Department of the Interior a concurrence role, along with the Governor of the State of Florida, in the development of six specific guidance memoranda related to important program-wide aspects of implementing the Plan. These guidance memoranda address the: (1) General format and content of Project Implementation Reports; (2) processes for evaluation of alternatives developed for Project Implementation Reports, their cost effectiveness and impacts; (3) general content of operating manuals; (4) general processes for the conduct of assessment activities of RECOVER; (5) process for identifying if an elimination or transfer of existing legal sources of water will occur as a result of implementation of the Plan; and (6)

process used in Project Implementation Reports for identifying the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system. In accordance with section 601(h)(3)(c)(ii) of WRDA 2000, the regulations prohibit concurrence by the Secretary of the Interior and the Governor of Florida on Project Implementation Reports, Project Cooperation Agreements, Operating Manuals for individual projects, and other documents relating to individual features of the Plan.

We revised the concurrence provisions in the final regulations so that the approval process for the guidance memoranda parallels the statutory concurrence process for the programmatic regulations. We deleted the language in the proposed regulations that said the Army would give "good faith consideration" to the concurrence or non-concurrence statements of the Secretary of the Interior and the Governor before approving the guidance memoranda. This language did not communicate adequately our intent to obtain the concurrence of the Secretary of the Interior and the Governor. Instead, it suggested that the Army simply had to fulfill a ministerial coordination requirement by asking the Secretary of the Interior and the Governor whether they concurred or non-concurred in the guidance memorandum. We felt that this language did not convey the Army's intent to actively seek the concurrence of the Secretary of the Interior and the Governor prior to approving the guidance memoranda.

The final regulations also provide that the Department of the Interior will play a significant role in addressing other issues related to the Plan. Like the proposed regulations, the final rule gives the Secretary of the Interior, along with the Governor of the State of Florida, a concurring role in the Secretary of the Army's determination of the pre-CERP baseline. The final regulations also envision that interim goals will be established through a formal Interim Goals Agreement among the Secretary of the Army, the Secretary of the Interior, and the Governor. Further, the Department of the Interior plays an important role in the Leadership Group of RECOVER, along with several other Federal and State agencies and Tribes.

Finally, the regulations give the Department of the Interior an important consulting role throughout implementation of the program, including, among other things, participation on Project Delivery Teams; selection and revision of hydrologic

models; development of the Adaptive Management Program, Project Implementation Reports, Operating Manuals, and Comprehensive Plan Modification Reports; development, review and revision of changes to the Master Implementation Sequencing Plan; and the development of the means for monitoring progress towards other water-related needs of the region as provided for in the Plan.

Read together, we believe that these provisions give the Department of the Interior as well as the Governor of the State of Florida an important and appropriate role in implementing the Plan. This prominent role is consistent with Interior's natural resources stewardship and land management responsibilities.

L. Role of South Florida Ecosystem Restoration Task Force

Several commenters felt that the proposed regulations did not give the South Florida Ecosystem Restoration Task Force ("Task Force") an appropriate role in Plan implementation. The Task Force is an interagency group created by section 528(f) of the Water Resources Development Act of 1996 (110 Stat. 3770) (hereinafter "WRDA 1996") More specifically, the Miccosukee Tribe and the Seminole Tribe expressed the view that the Task Force could play a constructive role in facilitating an open discussion of issues related to implementation of the Plan among Federal, State, Tribal, and local interests. The Seminole Tribe also commented that information about alternatives developed for Project Implementation Reports should be shared with the Task Force before the completion of the draft Project Implementation Report.

The responsibilities of the Task Force are found in section 528 of WRDA 1996 and section 601 of WRDA 2000. In general, section 528 envisions that the Task Force will coordinate programs and research on ecosystem restoration, exchange information, provide assistance and facilitate resolution of conflicts involving the restoration of the South Florida ecosystem. Section 601 of WRDA 2000 gives the Task Force a consultation responsibility concerning the establishment of an independent scientific review panel to review the progress that is being made toward achieving the natural system restoration goals of the Plan.

The final regulations recognize that the Task Force can play a constructive role in Plan implementation. The regulations acknowledge the benefits that result from sharing issues with the

Task Force and set forth the intention of the agencies involved in implementing the Plan to regularly report to the Task Force as they do currently. We will continue to regularly report to the Task Force and its working group on Plan implementation matters and we expect that the Task Force will continue to provide valuable input regarding implementation of the Plan.

The South Florida Water Management District and the Jacksonville District already regularly report to the Task Force and its working group on CERP matters. We expect that informal coordination among the implementing agencies, the Task Force and its working group and its other advisory bodies will continue. For example, the Task Force may wish to have regular briefings on CERP implementation issues, on the Master Implementation Sequencing Plan, on Project Implementation Reports, or on Operating Manuals; or the Task Force may decide to have RECOVER provide the working group with information on work in progress. Further, we contemplate that the Task Force will determine, on a case-by-case basis, the manner and extent to which it is appropriate for it to be involved in CERP in order to carry out its existing statutory responsibilities.

The final regulations assure that the Task Force will be informed of certain matters of significance. They specifically state that the Task Force will be notified of and given an opportunity to review and provide comment on a variety of issues, including but not limited to, interim goals, Project Implementation Reports, Pilot Project Design Reports, Pilot Project Technical Data Reports, the pre-CERP baseline, assessment reports, guidance memoranda, Master Implementation Sequencing Plan, Comprehensive Plan Modification Reports, periodic CERP updates, and reports to Congress. Finally, the regulations require that the Task Force shall be provided with information on the alternatives developed and evaluated for the Project Implementation Reports before completion of the draft Project Implementation reports.

M. Consultation

There was general agreement among those commenting on the proposed regulations that it is important for the agencies implementing the Plan to consult with interested parties. The Corps of Engineers and non-Federal sponsors are responsible for implementation of the Plan. However, successfully implementing the Plan requires more than the involvement of

these parties, it also requires extensive involvement by Tribes, Federal, State and local agencies.

One commenter recommended that the Tribal consultation provisions in the proposed regulations be revised to specifically state that the consultation with Tribes should be conducted on a government-to-government basis. This commenter also felt that the Federal trust responsibility for Tribes should not be tied to one Executive Order alone.

Other commenters expressed concerns about the time that would be allowed for consultations. Several commenters expressed the view that the time allowed for consultation should reflect the complexity of the task or issue under review. Another commenter suggested that the Tribes, agencies, and public be informed of the closing dates for consultation.

The final regulations contemplate that the implementing agencies will consult fully and openly with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies as the Plan is implemented. These consultation provisions ensure that interested parties are appropriately involved in implementing, evaluating, and modifying the Plan when necessary. The final regulations specifically state that the consultation with the Tribes will be conducted on a government-to-government basis and in compliance with applicable laws, Executive Orders, and regulations.

The final regulations contemplate that the consultations on Plan related matters will facilitate a timely exchange of views among the parties. This will ensure that the consultation process is not used as a tool to delay or veto actions. The final regulations also envision that the Corps of Engineers and the non-Federal sponsor will set reasonable limits on the time for consultations and inform parties of those limits, after giving appropriate consideration to the significance of the proposed action, the degree to which relevant information is known or obtainable, the degree to which the action is controversial, the state of the art of analytical techniques, the number of persons affected, the consequences of delay, and other time limits imposed on the agency by law, regulations, or Executive Order.

N. Operating Manuals

The provisions in the proposed regulations on Operating Manuals were

of interest to a number of commenters. These manuals provide operational guidance that is intended to ensure that the goals and purposes of the Plan are achieved. Project operating manuals provide guidance on operational concerns relevant to individual projects. System Operating Manuals provide guidance on operational concerns related to projects in the aggregate to ensure that projects function in a coordinated, systematic way. Several commenters expressed concerns that the proposed regulations would allow unconstrained deviations from the approved Operating Manuals because of provisions in the regulations that allowed for adjustments during years when substantial deviations from expected rainfall and runoff occur, or when required for adaptive management reasons. These commenters also were concerned that the precise circumstances in which these temporary deviations would be allowed were not specified. Another commenter expressed the view that the final regulations should include a provision that would ensure any changes to Operating Manuals are consistent with the goals and purposes of the Plan. Finally, one commenter felt that the final regulations should include a provision stating that the drought contingency plans that are mentioned in the regulations discussing Operating Manuals should be consistent with the Seminole Tribe's water rights compact.

The final regulations retain the concept of developing Project Operating Manuals and System Operating Manuals. They contain new provisions that allow for public review and comment before they are finalized. The regulations also specify that the System Operating Manual will be developed by December 31, 2005. They contemplate that a Project Operating Manual will be developed for each project and that a draft Project Operating Manual will be included as an appendix in the Project Implementation Report. This will ensure that the operation of the project is linked to the expected benefits of the project recommended in the Project Implementation Report. The final regulations state that the final Project Operating Manual will be prepared as soon as possible after completion of the operational testing and monitoring phase of the project. Additionally, a provision has been added to the regulations that will require modifications to operating manuals to be consistent with the goals and purposes of the Plan. We have deleted the proposed provision of concern regarding yearly adjustments and have

described the circumstances for allowing temporary deviations due to emergencies and unplanned minor deviations. The final regulations also require that the drought contingency plans be consistent with the Seminole water rights compact.

O. Master Implementation Sequencing Plan

Several parties commented on the provisions in the proposed regulations concerning the Master Implementation Sequencing Plan. This Master Implementation Sequencing Plan, identified as the framework for restoration of the South Florida ecosystem, covers 68 components that will be implemented as approximately 45 separate projects. The proposed regulations establish a process for developing a Master Implementation Sequencing Plan and a process for specifying that projects will be sequenced and scheduled to maximize the achievement of the goals and purposes of the Plan, including the achievement of the interim goals and interim targets at the earliest possible time, to the extent practical given scientific, technical, funding, contracting, and other constraints. One commenter felt that the Master Implementation Sequencing Plan should reflect the formulation and evaluation provisions and the results of Plan efforts currently underway. Another commenter believed that the Master Implementation Sequencing Plan should take into account the savings clause of WRDA 2000.

The final regulations contemplate that the Master Implementation Sequencing Plan will be developed within one year of the effective date of the programmatic regulations, following consultation with the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Indians, the U. S. Department of the Interior, the U.S. Department of Commerce, U.S. Environmental Protection Agency, the Florida Department of Environmental Protection, and other Federal, State and local agencies, as well as in consultation with the South Florida Ecosystem Restoration Task Force. They provide for sequencing and scheduling projects to ensure that each project delivers benefits, including benefits to the natural system, that justify the project, in the context of the then existing Central and Southern Florida Project, as modified by any Plan components that already have been implemented. The final regulations envision that the Master Implementation Sequencing Plan will base the sequence and schedule of projects on the best scientific, technical, funding, contracting, and other

information available. They also state that the Master Implementation Sequencing Plan will be revised as necessary to integrate new information such as updated schedules from Project Management Plans, the results of pilot projects and other studies, updated funding information, revisions to the Plan, Congressional or other authorization and direction, or information from the adaptive management program, including achievement of the expected performance level of the Plan and the interim goals and targets.

P. Adaptive Management Program

Several commenters thought that it was important to modify the proposed regulation's provisions concerning adaptive management in order to reinforce the importance of this management concept in implementing the Plan. Adaptive management is a crucial element of the Everglades Restoration Plan. It involves refining the Plan during its implementation to respond to new information or technologies to ensure that the goals and purposes of the Plan are fulfilled. The report of the Senate Committee on Environment and Public Works on WRDA 2000 (Senate Report No. 106–362) contains a discussion of that committee's expectations with respect to adaptive management:

The committee does not expect rigid adherence to the Plan as it was submitted to Congress. This result would be inconsistent with the adaptive management principles in the Plan. Restoration of the Everglades is the goal, not adherence to the modeling on which the April 1999 Plan was based. Instead, the committee expects that the agencies responsible for project implementation report formulation and Plan implementation will seek continuous improvement of the Plan based upon new information, improved modeling, new technology and changed circumstances.

One commenter suggested that the definition of adaptive management be revised to clarify its meaning. Another commenter pointed out that the Corps of Engineers and the South Florida Water Management District currently are in the process of updating the Plan to ensure that it is based on the latest available information and modeling. This commenter recommended that a direction to complete this update be included in the final regulations since the Plan is based on information and projections that are approximately five years old.

The final regulations contain a new definition of adaptive management. The regulations define adaptive management to mean:

The continuous process of seeking a better understanding of the natural system and human environment in the South Florida ecosystem, and seeking continuous refinements in and improvements to the Plan to respond to new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan in order to ensure that the goals and purposes of the Plan are fulfilled.

The final regulations also provide for the establishment of an adaptive management program that will guide the implementation of the Plan. This program will be used to assess the responses of the South Florida ecosystem to the Plan and to determine whether these responses match expectations, including anticipated performance levels. If the interim goals or targets are not achieved as anticipated, the Corps of Engineers and the South Florida Water Management District must determine why not, followed by either adaptive management actions to achieve the goals or targets as soon as practicable, or revisions to the goals or targets as appropriate.

The final regulations envision that the Corps of Engineers and the South Florida Water Management District, based on technical information developed by RECOVER, will prepare periodic assessment reports as part of this adaptive management program. These reports will be externally peer reviewed and used by the implementing agencies in consultation with others to evaluate whether the goals and purposes of the Plan are being achieved and to determine whether improvements to the Plan are warranted. The reports should prove invaluable in gaining an understanding of the Plan's effectiveness and in ensuring that its goals and purposes are fulfilled. The regulations also provide that in considering how the Plan may be improved, the Corps of Engineers and non-Federal project sponsor specifically shall consider modifying the design or operational plan for a project of the Plan not yet implemented; modifying the sequence or schedule for implementation of the Plan; adding new components to the Plan or deleting components not yet implemented; removing or modifying a component of the Plan already in place; or a combination of any of these actions.

The final regulations also specify that periodic CERP updates shall be performed, beginning within six months of the effective date of the programmatic regulations and whenever necessary to ensure that the goals and purposes of

the Plan are achieved, but not any less often than every five years. The periodic CERP updates will be accomplished by the Corps of Engineers and the South Florida Water Management District, in consultation with Tribes, Federal, State, and local agencies, to conduct an evaluation of the Plan using new or updated modeling that includes the latest scientific, technical, and planning information. The periodic CERP updates will provide a basis for determining if management actions are necessary to seek improvements in the Plan based upon new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan. The final regulations direct that as part of the periodic CERP update, the Corps of Engineers and the South Florida Water Management District will determine the total quantity of water that is expected to be generated by implementation of the Plan, including the quantity needed for the natural system and human environment.

The consultation provisions of the proposed regulations have been expanded to provide that the Corps of Engineers and the South Florida Water Management District also shall consult with the South Florida Restoration Task Force in conducting the evaluation of the Plan. The final regulations no longer provide for review of the assessment report by the independent science review panel. The independent science review panel will prepare its own report to Congress with its independent assessment of ecological indicators. It was deemed appropriate to keep these reports separate in order to provide for a truly comprehensive review of Plan performance and to ensure the independence of the science review panel by insulating it from any other aspect of Plan implementation or assessment beyond its statutory mission.

Q. Comprehensive Plan Modification Reports

We anticipate that the Plan will need to be revised periodically as part of the adaptive management program to reflect new information and to improve performance. The final regulations provide that a Comprehensive Plan Modification Report shall be prepared whenever significant revisions to the Plan are necessary to ensure that the goals and purposes of the Plan are achieved. The Comprehensive Plan Modification Report will be prepared using a process that parallels the process for developing a Project

Implementation Report. The final regulations provide that the final approved Comprehensive Plan Modification Report shall be transmitted to Congress. The final regulations also provide that the Comprehensive Plan Modification Report will include updated water budget information for the Plan, including the total quantity of water that is expected to be generated by implementation of the Plan, the quantity needed for the natural system in order to attain restoration goals, and the quantity generated for use in the human environment. In general, Plan modifications should be consistent with achieving the interim goals and targets. In some cases, the process of developing a Comprehensive Plan Modification Report (which includes consultation with Federal, State, and local agencies and public notice and comment) could identify necessary changes to the interim goals or targets. In this case, the goals or targets would be revised accordingly, as provided for in the final regulations.

We did not receive any comments on the proposed regulations provisions concerning Comprehensive Plan Modification Reports. We did make several changes in the proposed regulations to conform to the general comments made on other sections and to provide more detailed information related to these reports. For example, the final regulations state that the Comprehensive Plan Modification Report will be initiated at the discretion of the Corps of Engineers and South Florida Water Management District, in consultation with Federal, State, and local agencies and the Tribes. The regulations also set forth a series of general requirements related to the preparation of these reports.

R. Pre-CERP Baseline

The provisions in the proposed regulations concerning the pre-CERP baseline were of interest to a number of parties. Developing the pre-CERP baseline is an important step in ensuring that the goals and purposes of the Plan are fulfilled in accordance with WRDA 2000. This baseline is a tool for estimating hydrological conditions in the South Florida ecosystem on the date of enactment of WRDA 2000. It will be used to aid in the determination if existing legal sources of water will be eliminated or transferred as a result of project implementation and for determining the water made available by the Plan.

A number of commenters expressed concerns about the concurrence provisions for the pre-CERP baseline. These commenters pointed out that

WRDA 2000 only granted concurrence rights to the Secretary of the Interior and the Governor on the programmatic regulations. They believe that extending this concurrence process to the pre-CERP baseline was unnecessary and would cause delays in developing the baseline. Two commenters believed that the pre-CERP baseline should include all existing legal sources of water and also should include the levels of service for flood protection. One commenter observed that the requirement in the proposed rule that the pre-CERP baseline was to be consistent with the guidance memorandum for identifying the appropriate quantity, timing, and distribution of water to be dedicated and managed for the natural system might not be developed before the pre-CERP baseline is determined.

The final regulations provide guidance on developing the pre-CERP baseline. They envision that the pre-CERP baseline will include information on the quantity, timing, distribution, and quality of water in the South Florida ecosystem on the date of enactment of WRDA 2000. The regulations state that the pre-CERP baseline will be supported by appropriate documentation and will include a description of the assumptions on which it is based. Additional work performed by the Corps and the South Florida Water Management District with regard to the pre-CERP baseline indicates that the pre-CERP baseline does not need to be tied to the methodology for identification of water to be reserved for the natural system as these are two separate analyses. The final regulations require that the recommended project be compared to the pre-CERP baseline and other appropriate information to determine if an elimination or transfer of legal sources of water will be caused by implementation of the project. Therefore, the final regulations do not contain the provision from the proposed regulations that require the Corps of Engineers and South Florida Water Management District, when determining the pre-CERP baseline, to use a method consistent with the guidance memorandum that contains instructions for identifying the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system.

The final regulations provide that within six months of the effective date of the programmatic regulations, the Corps of Engineers and the South Florida Water Management District shall, in consultation with Tribes, Federal, State, and local agencies develop the pre-CERP baseline and

present it to the Secretary of the Army for consideration, memorialized in an appropriate document. The regulations state that the pre-CERP baseline shall be developed with the concurrence of the Secretary of the Interior and the Governor. The language gives the Secretary of the Interior and the Governor the same concurrence opportunity they had on the programmatic regulations. While this concurrence process is not required by law and will require additional time to fulfill, we believe it is appropriate to provide for this process because of the significance of the pre-CERP baseline.

Additionally, the final regulations specify that pre-CERP baseline water availability is one of the factors that will be assessed in each Project Implementation Report when determining the water that needs to be reserved for the natural system. In order to ensure that the levels of service for flood protection are not reduced, we have added a provision that requires each Project Implementation Report to include an analysis that considers the operational conditions included in the pre-CERP baseline.

S. Shortfall in Performance by a Project

Several commenters noted that the proposed regulations did not provide guidance on what actions should be taken when the amount of water generated by a project is less than the amount estimated when the Project Implementation Report was prepared. These commenters believe that such a shortfall in performance should be shared in an equitable manner among project purposes. One commenter proposed that, if a component does not produce the water expected, the shortfall should be shared equally. Another commenter proposed that if the actual operations of a component do not produce the amount of water expected for the natural system and other water-related needs of the region, "the shortfall be shared between all anticipated uses on a pro rata basis of what the project was expected to produce for each use." Other commenters want to ensure that the needs of the natural system and the savings clause requirements are provided first, before additional water for agricultural and urban needs is provided.

The proposed regulations did not address the shortfall question. Since the framework Plan includes 68 components that have different functions, we do not consider one general rule concerning shortfalls in performance to be appropriate. One unvarying rule for all projects might

also create problems under the savings clause. The final regulations provide that the Project Implementation Report (PIR) will include a plan for interim operations of the project in the event that the project fails to provide the quantity, timing, or distribution of water described in the PIR. The plan will take into account the specific purposes of the specific project component addressed in the PIR and the overall goals and purposes of the Plan. Under the final regulations, management actions must be taken as part of the adaptive management program to make permanent adjustments for shortfalls in performance on a system-wide basis.

T. Elimination or Transfer of Existing Legal Sources of Water

Several commenters noted that the proposed regulations did not contain a definition of the term "existing legal sources of water." Section 601(h)(5)(A) of WRDA 2000 contains a savings clause provision that is designed to ensure that an existing legal source of water is not eliminated or transferred until a replacement source of water of comparable quantity and quality as was available on the date of enactment of WRDA 2000 is available. The statute states that "the Secretary and the non-Federal sponsor shall not eliminate or transfer existing legal sources of water, including those for—(i) agricultural or urban water supply; (ii) allocation or entitlement to the Seminole Indian Tribe of Florida * * * (iii) the Miccosukee Tribe of Indians of Florida; (iv) water supply for Everglades National Park; (v) water supply for fish and wildlife."

The report of the Senate Committee on Environment and Public Works on WRDA 2000 (Senate Report No. 106–362) describes the intent of the prohibition against the elimination or transfer of legal sources of water as follows:

Elimination of existing sources of water supply is barred until new sources of comparable quantity and quality of water are available; existing authorized levels of flood protection are maintained; and the water compact among the Seminole Tribe of Florida, the State, and the South Florida Water Management District is specifically preserved.

Although WRDA 2000 uses the term "existing legal sources of water," it does not define the term; nor could we find a definition of this term elsewhere in Federal or State law. Several commenters believed that the term should include all sources of water. According to this view, a legal source of water that was available on the date of enactment of WRDA 2000 would

include water that was accessible and could have been used on that date, as well as water that actually was used or permitted to be used on that date. These commenters pointed out that the statute refers to existing legal "sources" not existing legal "uses." Other commenters believed that existing legal sources of water should be limited to water permitted for consumptive use. Still others believed that the term was further limited to consumptive uses that not only were permitted, but also were actually used, on the date of enactment. One commenter suggested that a guidance memorandum be developed that defines an existing legal source of water and provides guidance for determining if the implementation of a project will cause an elimination or transfer of an existing legal source of water.

The final regulations provide for the development of a guidance memorandum that will define "existing legal sources of water." This guidance memorandum also will describe the process for determining if existing legal sources of water are to be eliminated or transferred and for determining if a new source of water of comparable quantity and quality as that available on the date of enactment of WRDA 2000 is available to replace the water to be lost as a result of implementation of the Plan.

The final regulations also state that the Project Implementation Report will include an analysis to determine if the project will cause an elimination or transfer of existing legal sources of water. The final regulations also state that the recommended project will be compared to the pre-CERP baseline and other appropriate information to determine if an elimination or transfer of legal sources of water will be caused by implementation of the project. If the project will cause an elimination or transfer of a source of water, then the Project Implementation report will include measures to ensure that such elimination or transfer will not take place until a new source of water of comparable quantity or quality is available to replace the water that would be lost as a result of implementation of the Plan.

In accordance with WRDA 2000, the regulations make clear that the Secretary of the Army and the non-Federal sponsor will not eliminate existing legal sources of water, including those for agricultural or urban water supply, an allocation or entitlement of the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, water supply for Everglades National Park, and water supply for fish and wildlife. Some commenters wanted the

regulation to include a definition for urban water supply. We have not included a definition of urban water supply because we believe that such a definition should be more appropriately developed with the definition of existing legal sources of water that will be defined in the required guidance memorandum.

U. Flood Protection

The WRDA 2000 provisions concerning the maintenance of flood protection were of interest to several commenters. Section 601(h)(5)(B) of WRDA 2000 contains a savings clause provision that is designed to ensure that levels of service for flood protection are not reduced by implementation of a project. This provision specifically states "implementation of the Plan shall not reduce levels of service for flood protection that are "(i) in existence on the date of enactment of this Act; and (ii) in accordance with applicable law."

The report of the Senate Committee on Environment and Public Works on WRDA 2000 (Senate Report No. 106–362) describes the intent of the flood protection savings clause as follows:

With respect to flood control, the committee intends that implementation of the Plan will not result in significant adverse impact to any person with an existing, legally recognized right to a level of protection against flooding. The committee does not intend that, consistent with benefits included in the Plan, this bill create any new rights to a level of protection against flooding that is not currently recognized under applicable Federal or State law.

Several commenters felt that the final regulations should contain additional guidance on how to interpret the provisions providing for the maintenance of flood protection. One commenter believed that the savings clause provisions for flood protection also should be extended to the natural system and should be interpreted to prevent the transfer of excessive water to the natural system. This commenter also felt that the final regulations should define the term "in accordance with applicable law." Some commenters questioned how the Plan would address opportunities for increased levels of flood protection or the provision of flood protection in locations where there currently is no flood protection. These commenters felt that the regulation should specify that during the implementation of the Plan, the Project Delivery Teams will consider opportunities for providing additional flood protection.

We have concluded that the existing levels of service for flood protection for a particular area should be determined

on a project-by-project basis. Accordingly, the final regulations specify that Project Implementation Reports will include an appropriate analysis and consider the operational conditions included in the pre-CERP baseline to demonstrate that the levels of service for flood protection that were in existence on the date of enactment of WRDA 2000 and is in accordance with applicable law will not be reduced by the project. The Project Implementation Report process provides numerous opportunities for the Project Delivery Team, the public, and the South Florida Ecosystem Restoration Task Force, to examine the levels of service of flood protection provided by previous projects and any law applicable to the specific area affected by the Project Implementation Report. Finally, the regulations acknowledge that the overarching objective of the Plan is the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection. Accordingly, the final regulations provide for the evaluation of additional flood protection, provided that such flood protection is consistent with the other goals and purposes of the Plan.

V. NEPA Compliance

The Council on Environmental Quality regulations that implement the National Environmental Policy Act (NEPA) (40 CFR 1505.1 and 1507.3), specify that agencies must issue regulations identifying typical classes of actions that normally require environmental impact statements, that normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions), or that normally require environmental assessments but not necessarily environmental impact statements. The Corps of Engineers has adopted procedures fulfilling this requirement in 33 CFR 230. The final regulations consider the actions needed to implement the Plan on a system-wide basis and apply the principles of 33 CFR 230 to those actions to ensure that the provisions of NEPA are fulfilled. The regulations identify certain actions that generally require preparation of a NEPA document (either an Environmental Impact Statement or an environmental assessment) or that do not require the preparation of a NEPA document because they are subject to a categorical exclusion under NEPA.

The final regulations envision that ordinarily the NEPA documentation for a particular project will accompany the Project Implementation Report. For this

reason, other project-specific documents such as the Project Cooperation Agreement, Project Management Plan, and plans and specifications for the project are listed as categorically excluded from NEPA documentation requirements. It is important to note that identifying a document as being categorically excluded from NEPA does not mean that the environmental effects of the action covered by that document will not be analyzed as required under NEPA. The Corps of Engineers will fully analyze and consider these effects at an appropriate time as required by NEPA. This analysis will be accomplished at the time the Corps of Engineers develops its specific project proposal in the Project Implementation Report. This process accords with NEPA's provisions on timing (40 CFR 1502.5 and 1508.23) and its admonishment to avoid duplication (§ 1500.4) and improper segmentation of Federal actions (§ 1502.4).

Some commenters expressed the view that the guidance memorandum for determining the quantity, timing and distribution of water dedicated and managed for the natural system in a Project Implementation Report (PIR) should be analyzed in an Environmental Impact Statement (EIS). Since the guidance memorandum is procedural and does not affect the environment, recommend legislation, or determine a specific quantity, timing, or distribution of water for a specific component, it is not considered a "major Federal action" under NEPA. As noted, the specific project proposal, which is governed by the guidance memorandum, will be subject to a full NEPA analysis in the Project Implementation Report.

Similar comments were directed at the interim goals. Some commenters felt that the interim goals were not "major Federal actions" affecting the environment under NEPA. These commenters regarded the interim goals as evaluation and reporting tools. Other commenters maintained that the interim goals are planning goals and that as such should be subject to a full NEPA analysis. We have determined that the interim goals and interim targets do not require separate NEPA analysis. Interim goals are means by which the restoration success of the Plan may be evaluated; interim targets are means by which progress towards other water-related needs of the region may be evaluated. The Plan itself has undergone NEPA analysis. Future decisions about the environment that involve interim goals and interim targets will be analyzed in other NEPA documents. Projects implementing the Plan will be analyzed under NEPA in Project

Implementation Reports. This will include an analysis of how the project contributes to the goals and purposes of the Plan, including the interim goals and interim targets. The effect of sequencing on the achievement of interim goals and interim targets will be analyzed under NEPA through the Master Implementation Sequencing Plan. The effect of changes to CERP on the achievement of interim goals and interim targets will also be analyzed under NEPA through the Comprehensive Plan Modification Report. For this reason, we have listed interim goals and interim targets as categorically excluded from NEPA. This is consistent with the NEPA implementing regulations, which specify the NEPA analyses should be structured to avoid duplication and improper segmentation of Federal actions.

Some commenters felt that Project Cooperation Agreements, Project Management Plans and Program Management Plans should not be categorically excluded from NEPA. The Project Cooperation Agreement is a written agreement between the non-Federal sponsor and the Federal government setting forth the Federal and non-Federal responsibilities for implementing the project. The Project Cooperation Agreement does not select among project alternatives, it merely sets forth the parties' contractual understandings with regard to a project proposal that previously has been selected in the Project Implementation Report. For this reason, we continue to believe that it is appropriate to extend a categorical exclusion to Project Cooperation Agreements; however, the Corps of Engineers will not conclude a Project Cooperation Agreement for a project before the environmental consequences of that project have been considered fully in an appropriate NEPA document accompanying a Project Implementation Report. Project Management Plans and Program Management Plans are administrative documents setting schedules and assigning tasks between the local sponsor and the Federal government. Accordingly, those items continue to be listed as categorically excluded in the final rule.

W. Outreach

Several commenters suggested that the outreach provisions in the proposed regulations be revised. A number of commenters requested inclusion of their community-based group as a specific entity with which to consult. Several commenters believed that the proposal did not make clear the need for effective

outreach throughout the implementation process, not just during the planning phase. In addition, several commenters believed that specific measurement tools were needed to monitor the effectiveness of the outreach effort and the minority contracting provisions. One commenter suggested that the regulations ensure that information is provided to socially and economically disadvantaged individuals and communities about potential or anticipated contracting opportunities. One commenter suggested that the regulations specify that meetings with the public should be scheduled at times and locations that are convenient to the public.

In the final regulations, we have broadened the definition of public to include community-based organizations. The regulations clarify that the public outreach provisions apply throughout the entire process of implementing the plan. The regulations also add a provision that public meetings and workshops will be held at times and locations that facilitate participation by the public. The final regulations also contain a provision to provide additional information to socially and economically disadvantaged individuals and communities about potential contracting opportunities, noting that the means chosen must be consistent with the outreach provisions of CERP and with other applicable provisions of Federal law. The intent of this provision is to share information with the public in a way that is allowable and consistent with the Federal Acquisition Regulations, the Competition in Contracting Act, and other applicable provisions of law and regulations.

X. Formulation and Evaluation of Alternatives

The final regulations explain that the Project Implementation Report is a document that provides information on plan formulation and evaluation, engineering and design, estimated benefits and costs, environmental effects, and the additional information that is necessary for the Secretary of the Army to approve the project for implementation, or for Congress to authorize the project for implementation. Several commenters felt that changes should be made to the provisions in the proposed regulations concerning the formulation and evaluation of alternatives for Project Implementation Reports. Some commenters believe that alternatives should be formulated, evaluated, and justified on their ability to provide system-wide benefits. One commenter

felt that the language in the proposed regulations, which requires system formulation and evaluation to compare "total benefits and costs of the alternative under both the with-CERP and without-CERP condition," is vague. The same commenter stated that the proposed regulation's inclusion of the evaluation of a selected alternative as the last-added increment of the Plan was superfluous, because the proposed regulations already require proposed alternatives to be evaluated on the basis they contribute to the achievement of the goals and purposes of the Plan. One commenter believed that constraining plan formulation within the funding target for the project established by the April 1999 "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement" was not appropriate and would inhibit full consideration of alternatives. Another commenter believed that the proposed regulations envisioned an overly narrow definition of cost effectiveness. Some comments cautioned that the formulation and evaluation of alternatives should not mimic traditional Corps of Engineers planning principles because in their view, traditional Corps of Engineers planning has focused on the quantification of benefits at customary civil works projects, rather than achieving the unique goal of restoring an entire ecosystem. There was general agreement that the formulation and evaluation of alternatives should not elevate the goal of fulfilling the other water-related needs of the region over the goal of fulfilling the ecological needs of the South Florida ecosystem simply because the benefits of fulfilling the other water-related needs are readily quantifiable and the benefits of fulfilling the ecological needs are not. This is consistent with section 601(h) of WRDA 2000 which states that the overarching objective of the Plan is the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection; and with section 601(f)(2), which states that the Secretary of the Army may determine that an activity under CERP is justified by the environmental benefits to be derived by the South Florida ecosystem, with no further economic justification required, provided the activity is cost-effective.

The final regulations remove the provision that constrains plan formulation to stay within the funding target for the project established in the April 1999 "Final Integrated Feasibility Report and Programmatic

Environmental Impact Statement.” Instead, the final regulations require that the Project Implementation Report include a discussion of any significant changes in cost or scope of the project from that presented in the April 1999 Report. They also require that in preparing Project Implementation Reports, the Corps of Engineers and the non-Federal sponsor will formulate and evaluate alternative plans in order to optimize the project’s contributions toward achieving the goals and purposes of the Plan on a system-wide basis in the most cost-effective manner, while also ensuring that the selected option provides benefits that justify costs on a next-added increment basis. The final regulations call for the development of a guidance memorandum that will describe the processes to be used to formulate and evaluate alternative plans and their associated monetary and non-monetary benefits and costs and the basis for justifying and selecting an alternative to be recommended for implementation. To aid the formulation and evaluation process, the final regulations also include definitions for the terms “alternative plan,” “justified,” and “optimize.” The definition of “justified” makes clear, consistent with section 601(f)(2) of WRDA 2000 that restoration benefits need not be quantified or monetized to justify costs, provided that the activity is justified by the environmental benefits derived by the South Florida ecosystem and is cost-effective. The regulations make clear that the project described in the April 1999 “Final Integrated Feasibility Report and Programmatic Environmental Impact Statement,” will be one of the alternative plans that will be evaluated. They also specify that the selected alternative plan will be the plan that maximizes net benefits while still being justified as the next-added increment. Under the final regulations, alternative plans that are not justified on a next-added increment basis will not be selected. Finally, we have revised figure 2 in Appendix A to better describe the formulation and evaluation activities conducted during the development of the Project Implementation Report.

In publishing these final regulations, we emphasize that the discussion in the regulations on plan formulation and evaluation should not be construed to elevate water supply and flood control benefits, which historically have been easier to quantify and place a monetary value on, over environmental restoration benefits, which are more difficult to quantify.

Y. References to Senate Committee Report Language

One commenter was concerned about references to the Senate Environment and Public Works Committee Report (Senate Report No. 106–362) in the preamble of the proposed regulations. This commenter expressed the view that Senate Committee Report 106–362 carries no legislative weight since the bill discussed in Senate Committee Report 106–362 differs in several critical areas from the final version of the bill adopted by the full United States Senate. We agree that the final statute differed in several areas from the bill discussed in the report and must be read with this limitation in mind. We have referred to the Senate Report in the preamble to the final regulations only where it provides relevant and reliable information to aid the understanding of issues involved in implementing the Plan.

V. Project Implementation Reports Approved Pursuant to Transition Rule

Section 601(h)(3)(D) of WRDA 2000 establishes a transition rule for Project Implementation Reports approved before the date of promulgation of the programmatic regulations. This transition rule requires that the Project Implementation Reports be consistent with the Plan. The transition rule also requires that the preamble of the programmatic regulations contain a statement concerning the consistency with the programmatic regulations of Project Implementation Reports that were approved prior to the date of issuance of the final regulations. Accordingly, this preamble specifically states that no Project Implementation Reports have been approved before the date of issuance of the final programmatic regulations.

VI. Concurrence Process for This Regulation

The Secretary of the Interior and the Governor are required by section 601(h)(3)(B) of WRDA 2000 to provide the Secretary of the Army with a written statement of concurrence or non-concurrence on the final programmatic regulations. The Secretary of Interior and the Governor shall provide concurrence or non-concurrence within 180 days of being provided with a copy of the final regulations.

The Department of the Army has sought to communicate openly and fully with the Department of the Interior and the State of Florida during the course of developing these regulations. We believe that this communication has improved the content of the regulations

and led to a full understanding of the views of these parties. The concurrency statements of the Department of the Interior and the State of Florida are included as an appendix to this document.

VII. Organization of the Final Regulations

We have organized the final regulations in five subparts. The first subpart, “General Provisions,” sets forth the purpose of the regulations, the applicability of the regulations, definitions pertaining to the regulations and other general information. The second subpart, “Program Goals and Responsibilities,” describes the goals and purposes of the Plan, implementation principles, implementation responsibilities, and consultation and coordination expectations. The remaining subparts were designed to be consistent with the content required by section 601(h)(3)(C). These subparts are: “Comprehensive Everglades Restoration Plan Implementation Processes,” “Incorporating New Information into the Plan,” and “Ensuring Protection of the Natural System and Water Availability Consistent with the Goals and Purposes of the Plan.”

VIII. Administrative Requirements

A. Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

The final regulations do not impose any information collection requirements for which Office of Management and Budget (OMB) approval under the Paperwork Reduction Act is required. Thus, this action is not subject to the Paperwork Reduction Act.

B. Executive Order 12866, as Amended

Under Executive Order 12866 (58 FR 51735, October 4, 1993), as amended, we must determine whether the regulatory action is “significant” and therefore subject to review by the Office of Management and Budget and the requirements of the Executive Order. The Executive Order defines “significant regulatory action” as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees,

or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, as amended, it has been determined that the final regulations are a "significant regulatory action" in light of the provisions of paragraph (4) above. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the public record.

C. Executive Order 13132

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires the development of an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications." "Policies that have Federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Although the final regulations define the relationships between the Federal and State partners, it is limited to implementation of the Comprehensive Everglades Restoration Plan. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, within the meaning of Executive Order 13132. Nevertheless, the Corps of Engineers has consulted closely with the State and local officials in developing the final regulations.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended (5 U.S.C. 601 *et seq.*) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions. For purposes of assessing the impacts of the proposed rule on small entities, a small entity is defined as: (1) A small business based on SBA

size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. We certify that this action will not have a significant economic impact on a substantial number of small entities. The final regulations only establish processes and governmental relationships that will be used for implementation of the Comprehensive Everglades Restoration Plan.

E. Unfunded Mandates Reform Act

We have determined in accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) The final regulations will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required. Small governments will only be affected to the extent that they agree to act as a non-Federal sponsor for implementation of projects for the Comprehensive Everglades Restoration Plan. The final regulations do not establish new or different requirements for non-Federal sponsors for implementation of projects for the Comprehensive Everglades Restoration Plan. The Savings Clause ensures that small governments, including public water utilities, will not be impacted by the loss of an existing legal source of water, or existing levels of service for flood protection that were in effect on the date of enactment of WRDA 2000, and in accordance with applicable law.

(b) The final regulations will not produce a Federal mandate of \$100 million or greater in any year, and therefore, do not constitute a "significant regulatory action" under the Unfunded Mandates Reform Act. The final regulations define processes and relationships between the Federal and State partners in implementing the Comprehensive Everglades Restoration Plan. The regulations do not affect the cost sharing requirements for non-Federal sponsors in implementing the Plan and therefore, impose no new obligations on State or local governments.

F. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (the NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note), directs us to use voluntary consensus standards in our regulatory

activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards. These regulations do not involve technical standards. Therefore, we did not consider the use of any voluntary consensus standards.

G. Executive Order 13045

Executive Order 13045, as amended, entitled "Protection of Children From Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that: (1) Was initiated after April 21, 1997, or for which a notice of proposed rulemaking was published after April 21, 1998; (2) is determined to be "economically significant" as defined under Executive Order 12866, and (3) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets all three criteria, we must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives that were considered. The final regulations are not subject to Executive Order 13045 because it is not an economically significant regulatory action as defined by Executive Order 12866. The final regulations establish processes for the implementation of the Comprehensive Everglades Restoration Plan and define the relationships between the Federal and State partners for implementation. Furthermore, the regulations do not concern an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children.

H. Executive Order 13175

Under Executive Order 13175, we may not issue a regulation that has substantial, direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of powers and responsibilities between the Federal government and Indian tribes, and imposes substantial direct compliance costs on those communities, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct

compliance cost incurred by the Tribal governments, or we consult with those governments. If we comply by consulting, Executive Order 13175 requires us to provide the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of our prior consultation with representatives of affected Tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13175 requires us to develop an effective process permitting elected officials and other representatives of Indian Tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities." The final regulations are required by section 601(h)(3) of WRDA 2000. Additionally, the final regulations do not impose significant compliance costs on any Indian Tribes. The regulations establish processes for the implementation of the Comprehensive Everglades Restoration Plan and define the relationships between the implementing entities. Accordingly, the requirements of section 3(b) of Executive Order 13175 do not apply to these final regulations. However, the Corps of Engineers recognizes that two Indian Tribes, the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida, have a significant direct interest in the implementation of the CERP and the framework for its implementation that will be established by these programmatic regulations. We have thus consulted extensively with these Tribes in the development of the regulations, and have included requirements for continued consultation in all significant project implementation components, including program-wide guidance memoranda, Project Management Plans, Program Management Plans, Project Implementation Reports, Project Operating Manuals, the System Operating Manual, and the Master Implementation Sequencing Plan. These Tribes also are included in the Leadership Group of RECOVER and participate in the Project Delivery Teams and the South Florida Ecosystem Restoration Task Force, which has played and will continue to play a consultative role on many aspects of CERP implementation. Finally, § 385.10(b) includes a general requirement for consultation with the Tribes "throughout the implementation process."

I. Executive Order 12630

In accordance with Executive Order 12630 entitled "Governmental Actions and Interference with Constitutionally Protected Property Rights," the final regulations will not effect a taking of private property or otherwise have taking implications. Therefore, a takings implication assessment is not required. The final regulations establish processes to be used in implementing the Comprehensive Everglades Restoration Plan and in and of itself does not address property needs.

J. Civil Justice Reform

In accordance with Executive Order 12988, we have determined that the final regulations do not unduly burden the judicial system and meet the requirements of sections 3(a) and 3(b)(2) of the Executive Order. The final regulations establish processes to be used in implementing the Comprehensive Everglades Restoration Plan and define the relationships between the governmental entities that will implement the Plan.

K. Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) that applies to regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Because the final regulations are not expected to significantly affect energy supplies, distribution, or use, this action is not a significant energy action and no Statement of Energy Effects is required.

L. Executive Order 13272

On August 13, 2002, the President issued an Executive Order (E.O. 13272) that requires that agencies review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided for in the Regulatory Flexibility Act, as amended (5 U.S.C. 601 *et seq.*) We have determined that this action will not have a significant economic impact on a substantial number of small entities. The final regulations only establish processes and governmental relationships that will be used for implementation of the Comprehensive Everglades Restoration Plan.

M. Environmental Documentation

As required by the National Environmental Policy Act (NEPA), the Department of the Army prepares appropriate environmental

documentation for its activities affecting the quality of the human environment. We have determined that the final regulations do not constitute a major Federal action significantly affecting the quality of the human environment. Therefore, environmental documentation under the National Environmental Policy Act (NEPA) is not required for the final regulations. One commenter expressed the view that an Environmental Impact Statement was necessary for the regulations. The Corps of Engineers has prepared appropriate environmental documentation, including a Programmatic Environmental Impact Statement, for the Comprehensive Everglades Restoration Plan. Today's final regulations do not implement any of the features of the Plan. Rather, the final regulations identify the processes to be followed in implementing features of the Plan. Moreover, the final regulations establish requirements for the preparation of appropriate environmental documentation as part of the implementation process. Accordingly, we continue to believe that an EIS is not warranted.

List of Subjects in 33 CFR Part 385

Environmental protection, Flood control, Intergovernmental relations, Natural resources, Water resources, Water supply.

Dated: October 30, 2003.

John Paul Woodley, Jr.,

*Assistant Secretary of the Army (Civil Works),
Department of the Army.*

■ Accordingly, as set forth in the preamble, the Army Corps of Engineers adds 33 CFR part 385 as follows:

■ Add part 385 to read as follows:

PART 385—PROGRAMMATIC REGULATIONS FOR THE COMPREHENSIVE EVERGLADES RESTORATION PLAN

Subpart A—General Provisions

Sec.

385.1 Purpose of the programmatic regulations.

385.2 Applicability of the programmatic regulations.

385.3 Definitions.

385.4 Limitation on applicability of programmatic regulations.

385.5 Guidance memoranda.

385.6 Review of programmatic regulations.

385.7 Concurrency statements.

Subpart B—Program Goals and Responsibilities

Sec.

385.8 Goals and purposes of the Comprehensive Everglades Restoration Plan.

385.9 Implementation principles.

385.10 Implementation responsibilities, consultation, and coordination.

Subpart C—CERP Implementation Processes

Sec.

- 385.11 Implementation process for projects.
- 385.12 Pilot projects.
- 385.13 Projects implemented under additional program authority.
- 385.14 Incorporation of NEPA and related considerations into the implementation process.
- 385.15 Consistency with requirements of the State of Florida.
- 385.16 Design agreements.
- 385.17 Project Delivery Team.
- 385.18 Public outreach.
- 385.19 Environmental and economic equity.
- 385.20 Restoration Coordination and Verification (RECOVER).
- 385.21 Quality control.
- 385.22 Independent scientific review and external peer review.
- 385.23 Dispute resolution.
- 385.24 Project Management Plans.
- 385.25 Program Management Plans.
- 385.26 Project Implementation Reports.
- 385.27 Project Cooperation Agreements.
- 385.28 Operating Manuals.
- 385.29 Other project documents.

Subpart D—Incorporating New Information into the Plan

Sec.

- 385.30 Master Implementation Sequencing Plan.
- 385.31 Adaptive management program.
- 385.32 Comprehensive Plan Modification Report.
- 385.33 Revisions to models and analytical tools.
- 385.34 Changes to the Plan.

Subpart E—Ensuring Protection of the Natural System and Water Availability Consistent with the Goals and Purposes of the Plan

Sec.

- 385.35 Achievement of the benefits of the Plan.
- 385.36 Elimination or transfer of existing legal sources of water.
- 385.37 Flood protection.
- 385.38 Interim goals.
- 385.39 Evaluating progress towards other water-related needs of the region provided for in the Plan.
- 385.40 Reports to Congress.

Appendix A—Illustrations to Part 385

Authority: Section 601, Pub. L. 106–541, 114 Stat. 2680; 10 U.S.C. 3013(g)(3); 33 U.S.C. 1 and 701; and 5 U.S.C. 301.

Subpart A—General Provisions

§ 385.1 Purpose of the programmatic regulations.

(a) The programmatic regulations of this part implement the provisions of section 601(h)(3) of the Water Resources Development Act of 2000, Public Law 106–541, 114 Stat. 2688 (hereinafter

“WRDA 2000”), which was enacted on December 11, 2000.

(b) The purpose of the programmatic regulations of this part is to ensure that the goals and purposes of the Comprehensive Everglades Restoration Plan (the Plan) are achieved and to establish the processes necessary for implementing the Plan. Some of these processes are project specific, including, but not limited to, development of Project Implementation Reports, Project Cooperation Agreements, plans and specifications, Pilot Project Technical Data Reports, and Operating Manuals. Other processes are of more general applicability, including, but not limited to, development of program-wide guidance memoranda, interim goals, interim targets, and the Master Implementation Sequencing Plan. Taken together, these processes will ensure that the restoration purposes and other goals of the Plan are achieved. The regulations of this part also describe the relationship among the various entities responsible for implementation of the Plan.

(c) Section 601(h) of WRDA 2000 establishes an integrated framework for assuring that the goals and purposes of the Plan are achieved. This framework includes tools for planning, implementation, and evaluation; a process for developing these tools in an open public process, with input from other Federal, State, and local agencies; and an enforcement mechanism to ensure that the requirements of the statute are carried out.

(1) Tools.

(i) The specific planning tool established by section 601(h) is the Project Implementation Report.

(ii) The specific implementation tools established by section 601(h) are Project Cooperation Agreements and Operating Manuals.

(iii) The specific evaluation tool established by section 601(h) is the interim goals for evaluating the restoration success of the Plan.

(iv) In addition to the specific planning, implementation, and evaluation tools established by section 601(h), the regulations of this part establish additional tools, including but not limited to, Project Management Plans, Program Management Plans, Comprehensive Plan Modification Reports, the Master Implementation Sequencing Plan, and interim targets for evaluating progress towards achieving the other water related needs of the region.

(2) *Processes.* The regulations of this part establish the processes for developing these tools. Consistent with section 601(h), these regulations have

been developed, after notice and opportunity for public content, with the concurrence of the Secretary of the Interior and the Governor, and in consultation with the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Administrator of the Environmental Protection Agency, the Secretary of Commerce, the Florida Department of Environmental Protection, and other Federal, State, and local agencies.

(3) *Enforcement mechanism.* The specific enforcement mechanism established by Section 601(h) is the “Comprehensive Everglades Restoration Plan Assurance of Project Benefits Agreement,” dated January 9, 2002, between the President and the Governor, under which the State shall ensure, by regulation or other appropriate means, that water made available by each project in the Plan shall not be permitted for a consumptive use or otherwise made unavailable by the State until such time as sufficient reservations of water for the restoration of the natural system are made under State law in accordance with the project implementation report and consistent with the Plan.

(4) *Public information.* The Secretary of the Army shall ensure that the public understands the linkage between the processes, tools, and enforcement mechanism and can monitor the effectiveness of this integrated framework in assuring that the goals and purposes of the Plan are achieved, as provided for in the regulations of this part, by:

(i) Providing for public notice and comment in the development of planning, implementation, and evaluation tools;

(ii) Providing notice of final action on planning, evaluation, and implementation tools;

(iii) Making available to the public on a web site or by other appropriate means final, and where appropriate draft, copies of all planning, evaluation, and implementation tools; and

(iv) Explaining through the regulations of this part and by other appropriate means the process for developing the tools, the linkage between the process, tools, and enforcement mechanism, and the means by which these elements constitute an integrated framework for assuring that the goals and purposes of the Plan are achieved.

§ 385.2 Applicability of the programmatic regulations.

(a) This part applies to all activities conducted to implement the

Comprehensive Everglades Restoration Plan.

(b) As used in this part, the Secretary of the Army acts through the Assistant Secretary of the Army for Civil Works with respect to the Army's civil works program pursuant to 10 U.S.C. 3016.

(c) Nothing in this part shall be interpreted to amend, alter, diminish, or otherwise affect:

(1) The rights, powers and duties provided under the "Comprehensive Everglades Restoration Plan Assurance of Project Benefits Agreement," dated January 9, 2002 pursuant to section 601(h)(2) of WRDA 2000; or

(2) Any existing legal water rights of the United States, the State of Florida, the Miccosukee Tribe of Indians of Florida, or the Seminole Tribe of Florida, including rights under the compact among the Seminole Tribe of Florida, the State, and the South Florida Water Management District, defining the scope and use of water rights of the Seminole Tribe of Florida, as codified by section 7 of the Seminole Indian Land Claims Settlement Act of 1987 (25 U.S.C. 1772e).

(d) This part is intended to aid the internal management of the implementing agencies and is not intended to create any right or benefit enforceable at law by a party against the implementing agencies or their officers. Nothing in this part shall create a right or expectation to benefits or enhancements, temporary or permanent, in third parties that are not specifically authorized by Congress in section 601 of WRDA 2000.

(e) Nothing in this part is intended to, or shall be interpreted to, reserve or allocate water or to prescribe the process for reserving or allocating water or for water management under Florida law. Nor is this part intended to, nor shall it be interpreted to, prescribe any process of Florida law.

§ 385.3 Definitions.

For the purposes of this part, the following terms are defined:

Adaptive management means the continuous process of seeking a better understanding of the natural system and human environment in the South Florida ecosystem, and seeking continuous refinements in and improvements to the Plan to respond to new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan in order to ensure that the goals and purposes of the Plan are fulfilled.

Alternative plan means a plan that consists of a system of structural and/or nonstructural measures, strategies, or programs formulated to achieve, fully or partially, the goals and purposes of the Plan, as further defined in section 1.6.1 of the Water Resources Council's "Economic and Environmental Guidelines for Water and Related Land Resources Implementation Studies," dated March 10, 1983.

Assessment means the process whereby the actual performance of implemented projects is measured and interpreted based on analyses of information obtained from research, monitoring, modeling, or other relevant sources.

Central and Southern Florida (C&SF) Project means the project for Central and Southern Florida authorized under the heading "CENTRAL AND SOUTHERN FLORIDA" in section 203 of the Flood Control Act of 1948 (62 Stat. 1176) and any modification authorized by any other provision of law, including section 601 of WRDA 2000.

Component means features of the Plan that include, but are not limited to, storage reservoirs, aquifer storage and recovery facilities, stormwater treatment areas, water reuse facilities, canals, levees, pumps, water control structures, and seepage management facilities; the removal of canals, levees, pumps, and water control structures; and operational changes.

Comprehensive Everglades Restoration Plan (CERP) means the plan contained in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999, as modified by section 601 of WRDA 2000, and any subsequent modification authorized in law.

Comprehensive Plan Modification Report means the report prepared for approval by Congress of major changes to the Plan that are necessary to ensure that the goals and purposes of the Plan are achieved. The Comprehensive Plan Modification Report describes the formulation and evaluation of alternatives, recommended modifications to the Plan, and other economic, environmental, and engineering information, and includes the appropriate NEPA document.

Concurrence means the issuance of a written statement of concurrence or the failure to provide such a written statement within a time frame prescribed by law or this part.

Consultation means a process to ensure meaningful and timely input in the development of program and project activities, reports, manuals, plans, and

other documents from Federal, State, and local agencies, the Miccosukee Tribe of Indians of Florida, and the Seminole Tribe of Florida.

Coordination means the formal exchange of information and views, by letter, report, or other prescribed means, between the Corps of Engineers and the non-Federal sponsor and another agency or tribe, including but not limited to, the exchange of information and views regarding the development of Project Implementation Reports, Operating Manuals, and Comprehensive Plan Modification Reports. Coordination activities are required by and in accordance with purposes and procedures established by Federal policy (public law, executive order, agency regulation, memorandum of agreement, and other documents that memorialize policy of the Corps of Engineers).

Cost-effective means the least costly way of attaining a given level of output or performance, consistent with the goals and purposes of the Plan and applicable laws.

Design Agreement means the agreement between the Corps of Engineers and a non-Federal sponsor concerning cost sharing for activities related to planning, engineering, design, and other activities needed to implement the Plan.

Dispute means any disagreement between the agencies or tribes associated with implementation of the Plan that cannot be resolved by the members of a Project Delivery Team or RECOVER and that is elevated to decision makers at the respective agencies or tribes.

District Engineer means the District Engineer of the Corps of Engineers, Jacksonville District.

Division Engineer means the Division Engineer of the Corps of Engineers, South Atlantic Division.

Drought contingency plan means the plan required by § 222.5(i)(5) of this chapter and described in implementing Engineer Regulation ER 1110-2-1941 "Drought Contingency Plans," and means a plan contained within an Operating Manual that describes procedures for dealing with drought situations that affect management decisions for operating projects.

Environmental and economic equity means the fair treatment of all persons regardless of race, color, creed, national origin, or economic status, including environmental justice, and the provision of economic opportunities for small business concerns controlled by socially and economically disadvantaged individuals, including individuals with

limited English proficiency, in the implementation of the Plan.

Environmental justice means identifying and addressing, disproportionately high and adverse human health or environmental effects of a Federal agency's programs, policies, and activities on minority and low-income populations, in accordance with applicable laws, regulations, and Executive Orders.

Evaluation means the process whereby the performance of plans and designs relative to desired objectives is forecast through predictive modeling and other tools.

Expected performance level means the projected level of benefits to the natural system and human environment described in the Plan.

External peer review means a process to review and validate the scientific and technical processes and information developed for implementation of the Plan that is independent of the agencies involved in the implementation of the Plan.

Goals and purposes of the Plan means the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection.

Governor means the Governor of the State of Florida.

Guidance memorandum means the specific procedure, process, or other guidance specified in § 385.5(b) that is developed and approved by the Secretary of the Army with the concurrence of the Secretary of the Interior and the Governor.

Improved or new flood protection benefits means increased or new levels of service for flood protection that are identified in a Project Implementation Report and approved as a purpose of the project.

Independent scientific review means the process established pursuant to section 601(j) of WRDA 2000 to review the Plan's progress toward achieving the natural system restoration goals of the Plan.

Individual feature of the Plan means a component or group of components of the Plan related to and limited to one specific project of the Plan.

Interim goal is a means by which restoration success of the Plan may be evaluated throughout the implementation process. Interim goals provide a means of tracking restoration performance, as well as a basis for reporting on the progress made at specified intervals of time towards restoration of the South Florida ecosystem, and for periodically

evaluating the accuracy of predictions of system responses to the effects of the Plan.

Interim target is a means by which the success of the Plan in providing for other water-related needs of the region, including water supply and flood protection, may be evaluated throughout the implementation process. Interim targets provide a means of tracking Plan performance, as well as a basis for reporting on progress made at specified intervals of time towards providing for other water-related needs of the region, and for periodically evaluating the accuracy of predictions of system responses to the effects of the Plan.

Justified has the same meaning as in section 601(f)(2) of WRDA 2000 which states that the Secretary of the Army, in carrying out any activity to restore, preserve, or protect the South Florida ecosystem, may determine that an activity is justified by the environmental benefits derived by the South Florida ecosystem and no further economic justification for the activity is required, if the Secretary determines that the activity is cost-effective.

Levels of service for flood protection means the expected performance of the Central and Southern Project and other water management systems in the South Florida ecosystem, consistent with applicable law, for a specific area or region.

Master Implementation Sequencing Plan means the document that describes the sequencing and scheduling for the projects of the Plan.

Mediation means a non-binding dispute resolution process designed to assist the disputing parties to resolve a disagreement. In mediation, the parties mutually select a neutral and impartial third party to facilitate the negotiations.

Monitoring means the systematic process of collecting data designed to show the status, trends, and relationships of elements of the natural system and human environment at specific locations and times.

Natural system means all land and water managed by the Federal government or the State within the South Florida ecosystem including, but not limited to, water conservation areas; sovereign submerged land; Everglades National Park; Biscayne National Park; Big Cypress National Preserve; other Federal or State (including a political subdivision of a State) land that is designated and managed for conservation purposes; the contiguous near-shore coastal water of South Florida; and, any tribal land that is designated and managed for conservation purposes, as approved by the tribe.

Next-added increment means the evaluation of an alternative as the next project to be added to a system of projects already implemented. For the purposes of this part, this means analyzing an alternative as the next project to be added to a system of projects that includes only those projects that have been approved according to general provision of law or specific authorization of Congress and are likely to have been implemented by the time the project being evaluated is completed.

Non-Federal sponsor means a legally constituted public body that has full authority and capability to perform the terms of the Project Cooperation Agreement and the ability to pay damages, if necessary, in the event of failure to perform, pursuant to section 221 of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b).

Operating Manuals means the set of documents that describe how the projects of the Plan and the Central and Southern Florida Project are to be operated to ensure that the goals and purposes of the Plan are achieved. Operating Manuals include the System Operating Manual and Project Operating Manuals. Operating Manuals contain water control plans, regulation schedules, and operating criteria for project and/or system regulations as well as additional information necessary to operate projects to ensure that the goals and purposes of the Plan are achieved.

Optimize means to follow a reasonable and practical process for developing a plan that returns the greatest excess of benefits, both monetary and non-monetary, over costs.

Outreach means activities undertaken to inform the public about the Plan and activities associated with implementation of the Plan, and to involve the public in the decision-making process for implementing the Plan.

Performance measure means an element or component of the natural system or human environment that is expected to be influenced by the Plan that has been selected to be evaluated or monitored as representative of a class of responses to implementation of the Plan and compared with a level of output that is expected and desired during or following the implementation of the Plan.

Periodic CERP update means the evaluation of the Plan that is conducted periodically with new or updated modeling that includes the latest available scientific, technical, and planning information.

Pilot project means a project undertaken to address uncertainties associated with certain components of the Plan such as aquifer storage and recovery, in-ground reservoir technology, seepage management, and wastewater reuse. The purpose of pilot projects is to develop information necessary to better determine the technical feasibility of these components prior to development of a Project Implementation Report.

Pilot Project Design Report means the report that contains the technical information necessary to implement a pilot project.

Pilot Project Technical Data Report means the report that documents the findings and conclusions from the implementation and testing phases of a pilot project.

Plan means the Comprehensive Everglades Restoration Plan contained in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999, as modified by section 601 of WRDA 2000, and any subsequent modification authorized in law.

Plans and specifications means the information required to bid and construct the recommended project described in the Project Implementation Report.

Pre-CERP baseline means the hydrologic conditions in the South Florida ecosystem on the date of enactment of WRDA 2000, as modeled by using a multi-year period of record based on assumptions such as land use, population, water demand, water quality, and assumed operations of the Central and Southern Florida Project.

Program-level activity means those tasks, activities, or products that support more than one project or that are system-wide in scope.

Program Management Plan means the document that describes the activities, tasks, and responsibilities that will be used to produce and deliver the products that comprise a program-level activity.

Project means a component or group of components of the Plan that are implemented together to provide functional benefits towards achieving the goals and purposes of the Plan.

Project Cooperation Agreement (PCA) means the legal agreement between the Department of the Army and a non-Federal sponsor that is executed prior to project construction. The Project Cooperation Agreement describes the financial, legal, and other responsibilities for construction, operation, maintenance, repair,

rehabilitation, and replacement of a project.

Project Delivery Team means the inter-agency, interdisciplinary team led by the Corps of Engineers and the non-Federal sponsor that develops the technical products necessary to implement a project.

Project Implementation Report (PIR) means the report prepared by the Corps of Engineers and the non-Federal sponsor pursuant to section 601(h)(4)(A) of WRDA 2000 and described in section 10.3 of the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999.

Project Management Plan means the document that describes the activities, tasks, and responsibilities that will be used to produce and deliver the products necessary to implement a project.

Project Operating Manual means the manual that describes the operating criteria for a project or group of projects of the Plan. The Project Operating Manual is considered a supplement to the System Operating Manual and presents more detailed information on the operation of a specific project or group of projects.

Public means any individuals, organizations, or non-Federal unit of government that might be affected by or interested in the implementation of the Plan. The public includes regional, State, and local government entities and officials, public and private organizations, including community-based organizations, Native American (Indian) tribes, and individuals.

Quality control plan means the plan prepared in accordance with applicable regulations and policies of the Corps of Engineers that describes the procedures that will be employed to insure compliance with all technical and policy requirements of the Corps of Engineers and the non-Federal sponsor.

Reservation of water for the natural system means the actions taken by the South Florida Water Management District or the Florida Department of Environmental Protection, pursuant to Florida law, to legally reserve water from allocation for consumptive use for the protection of fish and wildlife.

Restoration means the recovery and protection of the South Florida ecosystem so that it once again achieves and sustains those essential hydrological and biological characteristics that defined the undisturbed South Florida ecosystem. As authorized by Congress, the restored South Florida ecosystem will be significantly healthier than the current system; however it will not completely

replicate the undisturbed South Florida ecosystem.

Restoration Coordination and Verification (RECOVER) means the interagency and interdisciplinary scientific and technical team described in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999 and established by the Corps of Engineers and the South Florida Water Management District to: ensure that a system-wide perspective is maintained; ensure the highest quality scientific and technical information is applied throughout the implementation process; and to assess, evaluate, and integrate the projects of the Plan with the overall goal of ensuring that the goals and purposes of the Plan are achieved.

South Florida ecosystem means the area consisting of the land and water within the boundary of the South Florida Water Management District in effect on July 1, 1999, including but not limited to, the Everglades, the Florida Keys, and the contiguous near-shore coastal water of South Florida.

South Florida Ecosystem Restoration Task Force (Task Force) means the task force established pursuant to section 528(f) of WRDA 1996 (110 Stat. 3770).

South Florida Water Management District (SFWMD) means the public body constituted by the State of Florida pursuant to Chapter 373.069 of the Florida Statutes.

State means the State of Florida.

System Operating Manual means the Operating Manual that provides an integrated system-wide framework for operating all of the implemented projects of the Plan and the Central and Southern Florida Project.

System-wide means pertaining to the Central and Southern Florida Project or the South Florida ecosystem, as a whole.

Technical review means the process that confirms that the engineering, economic, environmental, and other aspects of project formulation and design are in accord with appropriate Federal, State, and Corps of Engineers established standards and criteria, regulations, laws, codes, principles, and professional procedures that are necessary to ensure a quality product. Technical review also confirms the constructability and effectiveness of the product and the use of clearly justified and valid assumptions and methodologies.

Technical Review Team means the team established by the Corps of Engineers and the non-Federal sponsor to ensure quality control of documents and products produced by the Project

Delivery Team through periodic technical reviews of the technical aspects of projects.

Water budget means an account of all water inflows, outflows, and changes in storage over a period of time.

Water dedicated and managed for the natural system means the water to be reserved or allocated for the natural system under State law as identified in a Project Implementation Report.

Water made available means the water expected to be generated pursuant to the implementation of a project of the Plan in accordance with the Project Implementation Report for that project.

Without CERP condition means the conditions predicted (forecast) in the South Florida ecosystem without implementation of any of the projects of the Plan.

WRDA 1996 means the Water Resources Development Act of 1996, Public Law 104–303, which was enacted on October 12, 1996.

WRDA 2000 means the Water Resources Development Act of 2000, Public Law 106–541, which was enacted on December 11, 2000.

§ 385.4 Limitation on applicability of programmatic regulations.

In accordance with section 601(h)(3)(c)(ii) of WRDA 2000, this part expressly prohibits “the requirement for concurrence by the Secretary of the Interior or the Governor on Project Implementation Reports, Project Cooperation Agreements, Operating Manuals for individual projects undertaken in the Plan, and any other documents relating to the development, implementation, and management of individual features of the Plan, unless such concurrence is provided for in other Federal or State laws.”

§ 385.5 Guidance memoranda.

(a) *General.* (1) Technical guidance for internal management of Corps of Engineers personnel during Plan implementation will be normally issued in the form of Engineer Regulations, Circulars, Manuals, or Pamphlets, or other appropriate form of guidance.

(2) Guidance on the following six program-wide subjects shall be promulgated in accordance with paragraphs (b) and (c) of this section:

(i) General format and content of Project Implementation Reports (§ 385.26(a));

(ii) Instructions for formulation and evaluation of alternatives developed for Project Implementation Reports, their cost effectiveness and impacts (§ 385.26(b));

(iii) General content of operating manuals (§ 385.28(a));

(iv) General directions for the conduct of the assessment activities of RECOVER (§ 385.31(b));

(v) Instructions relevant to Project Implementation Reports for identifying the appropriate quantity, timing, and distribution of water to be dedicated and managed for the natural system (§ 385.35(b)); and

(vi) Instructions relevant to Project Implementation Reports for identifying if an elimination or transfer of existing legal sources of water will occur as a result of implementation of the Plan (§ 385.36(b)).

(b) *Special processes for development of six program-wide guidance memoranda.* The Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop the six guidance memoranda described in paragraph (a) of this section for approval by the Secretary of the Army. The Corps of Engineers and the South Florida Water Management District shall also consult with the South Florida Ecosystem Restoration Task Force in the development of these guidance memoranda. The following procedures shall apply to the specific guidance memoranda described in paragraph (a) of this section:

(1) Guidance memoranda shall be consistent with this part, applicable law, and achieving the goals and purposes of the Plan.

(2) The Secretary of the Army shall afford the public an opportunity to comment on each guidance memorandum prior to approval through the issuance of a notice of availability in the **Federal Register**.

(3) Approved guidance memoranda shall be made available to the public.

(4) The guidance memoranda specifically referenced in this part shall be developed by December 13, 2004.

(5) The six guidance memoranda described in paragraph (a) of this section shall be developed with the concurrence of the Secretary of the Interior and the Governor. Within 180 days after being provided with the final guidance memorandum, or such shorter period that the Secretary of the Interior and the Governor may agree to, the Secretary of the Interior and the Governor shall provide the Secretary of the Army with a written statement of concurrence or non-concurrence with the proposed guidance memorandum. A

failure to provide a written statement of concurrence or non-concurrence within such time frame shall be deemed as meeting the concurrency requirements of this section. A copy of any concurrency or nonconcurrency statements shall be made a part of the administrative record and referenced in the final guidance memorandum. Any nonconcurrency statement shall specifically detail the reason or reasons for the non-concurrence. If the six guidance memoranda described in paragraph (a) of this section create a special procedure for any individual Project Implementation Report, a specific Project Cooperation Agreement, an Operating Manual for a specific project component, or any other document relating to the development, implementation, and management of one specific individual feature of the Plan, this section does not require concurrence or non-concurrence on that special procedure. In lieu of concurrence or non-concurrence on such a special procedure, the Secretary of the Army shall consult with the Secretary of the Interior and the Governor.

(6) The Secretary of the Army shall consider incorporating into the regulations of this part the guidance memoranda specifically referenced in this section during future reviews and revisions of the regulations of this part.

(c) *Revisions to six Program-wide guidance memoranda.* The Secretary of the Army may, whenever the Secretary believes it is necessary, and in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the South Florida Water Management District, the Florida Department of Environmental Protection, other Federal, State, and local agencies, and the public, revise guidance memoranda that have been completed. Such revisions shall be developed and approved consistent with the provisions of paragraph (b) of this section. Revisions to the six guidance memoranda described in paragraph (a) of this section shall be made following the same concurrence process as in paragraph (b)(5) of this section.

(d) *Other guidance.* Nothing in this part shall be considered or construed to preclude the ability of the Corps of Engineers, the South Florida Water Management District, and other non-Federal sponsors from issuing other guidance or policy to assist in implementing the Plan. Any such guidance or policy shall be consistent

with applicable law, policy, and regulations.

§ 385.6 Review of programmatic regulations.

(a) The Secretary of the Army shall review, and if necessary revise, the regulations of this part at least every five years. In addition, the Secretary of the Army may review and revise the regulations of this part whenever the Secretary believes that such review and revision is necessary to attain the goals and purposes of the Plan. The Secretary of the Army shall place appropriate notice in the **Federal Register** upon initiating review of the regulations of this part.

(b) Upon completing the review of the regulations of this part, the Secretary shall promulgate any revisions to the regulations after notice and opportunity for public comment in accordance with applicable law, with the concurrence of the Secretary of the Interior and the Governor, and in consultation with the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Administrator of the Environmental Protection Agency, the Secretary of Commerce, and other Federal, State, and local agencies.

(c) Within 180 days after being provided with the final revisions to the programmatic regulations of this part, or such shorter period that the Secretary of the Interior and Governor may agree to, the Secretary of the Interior and the Governor shall provide the Secretary of the Army with a written statement of concurrence or non-concurrence with the revisions. A failure to provide a written statement of concurrence or non-concurrence within such time frame shall be deemed as meeting the concurrency process of paragraph (b) of this section. A copy of any concurrency or nonconcurrency statements shall be made a part of the administrative record and referenced in the final revised programmatic regulations. Any non-concurrency statement shall specifically detail the reason or reasons for the non-concurrence.

§ 385.7 Concurrency statements.

The administrative record of the programmatic regulations in this part contains a copy of the concurrency statements by the Secretary of the Interior and the Governor to the Secretary of the Army. The concurrency statements can be obtained from the Army Corps of Engineers, Jacksonville District, 701 San Marco Blvd., Jacksonville, Florida 32207, or by accessing the programmatic regulations Web page at: <http://>

www.evergladesplan.org/pm/progr_regs_final_rule.cfm.

Subpart B—Program Goals and Responsibilities

§ 385.8 Goals and purposes of the Comprehensive Everglades Restoration Plan.

(a) The Comprehensive Everglades Restoration Plan (CERP) is a framework for modifications and operational changes to the Central and Southern Florida Project. The overarching objective of the Plan is the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection.

(b) The Corps of Engineers, the South Florida Water Management District, and other non-Federal sponsors shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, implement the Plan, as authorized by Congress, to ensure the protection of water quality in, the reduction of the loss of fresh water from, and the improvement of the environment of the South Florida ecosystem and to achieve and maintain the benefits to the natural system and human environment described in the Plan, and required pursuant to section 601 of WRDA 2000, for as long as the project is authorized.

(c) The goal of the Plan is to restore, preserve, and protect the South Florida ecosystem while providing for other water-related needs of the region. The Plan is designed to accomplish this by providing the quantity, quality, timing, and distribution of water necessary to achieve and sustain those essential hydrological and biological characteristics that defined the undisturbed South Florida ecosystem. As authorized by Congress, the restored South Florida ecosystem will be significantly healthier than the current system; however it will not completely replicate the undisturbed South Florida ecosystem and some areas may more closely replicate the undisturbed ecosystem than others. Initial modeling showed that most of the water generated by the Plan would go to the natural system in order to attain restoration goals, and the remainder of the water would go for use in the human environment. The Corps of Engineers, the South Florida Water Management District, and other non-Federal sponsors

shall ensure that Project Implementation Reports identify the appropriate quantity, timing, and distribution of water to be dedicated and managed for the natural system that is necessary to meet the restoration goals of the Plan. In accordance with the "Comprehensive Everglades Restoration Plan Assurance of Project Benefits Agreement," dated January 9, 2002 pursuant to section 601(h)(2) of WRDA 2000, the South Florida Water Management District or the Florida Department of Environmental Protection shall make sufficient reservations of water for the natural system under State law in accordance with the Project Implementation Report for that project and consistent with the Plan before water made available by a project is permitted for a consumptive use or otherwise made unavailable.

(d) The Corps of Engineers and non-Federal sponsors shall implement the Plan in a manner to continuously improve the expected performance level of the Plan based upon new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the adaptive assessment principles contained in the Plan; and future authorized changes to the Plan integrated into the implementation of the Plan.

§ 385.9 Implementation principles.

The Corps of Engineers and the South Florida Water Management District and other non-Federal sponsors shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, conduct activities, including program-level activities, necessary to implement the Plan. Such activities shall be conducted as part of an integrated implementation program, in accordance with this part, and based on the following principles:

(a) Individual projects shall be formulated, evaluated, and justified based on their ability to contribute to the goals and purposes of the Plan and on their ability to provide benefits that justify costs on a next-added increment basis.

(b) Interim goals shall be established in accordance with § 385.38 to provide a means for evaluating restoration success of the Plan at specific time intervals during implementation. Interim targets to evaluate progress on

providing for other water-related needs of the region provided for in the Plan shall be established in accordance with § 385.39. Interim goals and interim targets shall be consistent with each other.

(c) Endorsement of the Plan as a restoration framework is not intended as a constraint on innovation during implementation through the adaptive management process. Continuous improvement of the Plan shall be sought to ensure that new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan are integrated into the implementation of the Plan. The adaptive management process provides a means for analyzing the performance of the Plan and assessing progress towards meeting the goals and purposes of the Plan as well as a basis for improving the performance of the Plan. Improving the performance of the Plan means enhancing the benefits of the Plan in terms of restoration of the natural system while providing for other water-related needs of the region, including water supply and flood protection.

§ 385.10 Implementation responsibilities, consultation, and coordination.

(a) *Implementing agencies.* Implementation of the Plan shall be the responsibility of the Corps of Engineers and the non-Federal sponsors.

(b) *Consultation.* (1) *Consultation with tribes.* (i) In addition to any other applicable provision for consultation with Native American Tribes, including but not limited to, laws, regulations, executive orders, and policies the Corps of Engineers and non-Federal sponsors shall consult with and seek advice from the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida throughout the implementation process to ensure meaningful and timely input by tribal officials regarding programs and activities covered by this part. Consultation with the tribes shall be conducted on a government-to-government basis.

(ii) In carrying out their responsibilities under section 601 of WRDA 2000 with respect to the restoration of the South Florida ecosystem, the Secretary of the Army and the Secretary of the Interior shall fulfill any obligations to the Indian tribes in South Florida under the Indian trust doctrine as well as other applicable legal obligations.

(2) *Consultation with agencies.* The Corps of Engineers and non-Federal sponsors shall consult with and seek advice from the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Florida Department of Environmental Protection, and other Federal, State, and local agencies throughout the implementation process to ensure meaningful and timely input by those agencies regarding programs and activities covered under this part. The time for, and extent of, consultation shall be appropriate for, and limited by, the activity involved.

(c) *Coordination.* The Corps of Engineers and the non-Federal sponsor shall coordinate implementation activities and the preparation of documents with other Federal, State, and local agencies and the tribes to fulfill the requirements of all applicable Federal and State laws, including but not limited to, the Fish and Wildlife Coordination Act, the National Environmental Policy Act, the Clean Air Act, the Clean Water Act, the National Historic Preservation Act, the Coastal Zone Management Act, the Marine Mammal Protection Act, and the Endangered Species Act.

(d) *Timeliness obligations of consultation.* Consultation involves reciprocal obligations: on the part of the Corps of Engineers and the non-Federal sponsor to involve agencies, tribes, and the public at an early stage and in such a way to ensure meaningful consultation, and on the part of the parties consulted to respond in a timely and meaningful fashion so that the implementation of the Plan is not jeopardized and so that delays do not result in other adverse consequences to restoration of the natural system, to the other goals and purposes of the Plan, or to the public interest generally. Prescribed time limits set by regulation are too inflexible for the entire consultation process. It is expected that the Corps of Engineers and the non-Federal sponsor will set reasonable time limits for consultation on specific decisions consistent with the purposes of this part and that the parties will consult in a timely and meaningful way. The Corps of Engineers and the non-Federal sponsor recognize that the time limits established for each specific decision will be proportionate to the complexity of the decision and will take into account the resources of the entity with whom the consultation is occurring in order to allow consultation to occur in a meaningful way. This part does not intend for a delay in consultation to be used as a de facto veto power. This part authorizes the

Corps of Engineers and the non-Federal sponsor to set reasonable limits on the amount of time for consultation. In setting reasonable time limits, the agencies and tribes may consider relevant considerations such as sequencing of projects, planning, contracting and funding, and any factor listed for setting time limits for consulting under the National Environmental Policy Act (NEPA) (40 CFR 1501.8), including but not limited to, the nature and size of the proposed action, the degree to which relevant information is known or obtainable, the degree to which the action is controversial, the state of the art of analytical techniques, the number of persons affected, and the consequences of delay. In engaging in consultation, the Corps of Engineers and non-Federal sponsor shall inform the agencies, tribes, and public of the ending date for consultation. In addition, the agencies and tribes should adhere to all time limits imposed by law, regulations or executive order. In appropriate circumstances, the Corps of Engineers and the non-Federal sponsor may extend the time for consultation upon a showing that delays will not result in adverse consequences to the implementation of the Plan, to the restoration of the natural system, to the other goals and purposes of the Plan, or to the public interest and that relevant considerations justify a longer time. Failure of an agency, tribe or the public to engage in consultation with the Corps of Engineers and the non-Federal sponsor, or file comments in, a timely and meaningful way shall not be a sufficient reason for extending a consultation or comment period. Nothing in this part is intended to alter existing time limits established by statute or other regulations.

(e) *South Florida Ecosystem Restoration Task Force.* The Department of the Army recognizes the valuable role that the South Florida Ecosystem Restoration Task Force (Task Force), its working group, and its other advisory bodies play in the discussion and resolution of issues related to the South Florida ecosystem. The Corps of Engineers and the South Florida Water Management District regularly brief the Task Force on the Plan and regularly serve on the working group and other advisory bodies. The Corps of Engineers and the South Florida Water Management District and other non-Federal sponsors shall continue to provide information to, and consult with, the South Florida Ecosystem Restoration Task Force, the Florida-based working group, and advisory

bodies to the Task Force as appropriate throughout the implementation process for the Plan. In addition to consultation with the Task Force specified elsewhere in this part, the Corps of Engineers and the South Florida Water Management District shall consult with the South Florida Ecosystem Restoration Task Force, its working group, and its advisory bodies, on other matters related to the implementation of the Plan, as the Task Force from time to time may request. Pursuant to the provisions of WRDA 1996, the Task Force shall provide general input concerning the implementation of the Plan. The Task Force shall provide recommendations to the Secretary of the Army regarding the implementation of the Plan, as provided in this part. The Secretary of the Army shall notify the Task Force to ensure it is afforded an opportunity to review and provide recommendations on reports and products, including but not limited to, interim goals and interim targets, Project Implementation Reports, Pilot Project Design Reports, Pilot Project Technical Data Reports, the pre-CERP baseline, assessment reports, guidance memoranda, Master Implementation Sequencing Plan, Comprehensive Plan Modification Reports, periodic CERP updates, and reports to Congress prepared pursuant to § 385.40.

Subpart C—CERP Implementation Processes

§ 385.11 Implementation process for projects.

Generally, the Corps of Engineers and non-Federal sponsors shall develop and implement projects in accordance with the process that is shown in figure 1 in Appendix A of this part. Typical steps in this process involve:

(a) *Project Management Plan.* The Project Management Plan describes the activities, tasks, and responsibilities that will be used to produce and deliver the products necessary to implement the project.

(b) *Project Implementation Report.* The Project Implementation Report provides information on plan formulation and evaluation, engineering and design, estimated benefits and costs, and environmental effects to bridge the gap between the conceptual design included in the Plan and the detailed design necessary to proceed to construction. The Project Implementation Reports will also set forth additional information and analyses necessary for the Secretary of the Army or Congress to approve the project for implementation.

(c) *Plans and specifications.* During this phase, final design of the project is completed and plans and specifications are prepared. Plans and specifications contain the information necessary to bid and construct the project.

(d) *Real estate acquisition.* The lands, easements, and rights-of way, and relocations necessary for the project are acquired prior to construction.

(e) *Construction.* This phase is the actual construction of a project's components and includes an interim operation and monitoring period to ensure that the project operates as designed.

(f) *Operation.* After construction of the project has been completed, it is operated in accordance with the System Operating Manual and the Project Operating Manual.

(g) *Monitoring and assessment.* After the project has been constructed, monitoring is conducted as necessary to assess the effectiveness of the project and to provide information that will be used for the adaptive management program.

§ 385.12 Pilot projects.

(a) The Plan includes pilot projects to address uncertainties associated with certain components such as aquifer storage and recovery, in-ground reservoir technology, seepage management, and wastewater reuse. The purpose of the pilot projects is to develop information necessary to better determine the technical feasibility of these components prior to development of a Project Implementation Report.

(b) Prior to initiating activities on a pilot project, the Corps of Engineers and the non-Federal sponsor shall develop a Project Management Plan as described in § 385.24.

(c) Project Implementation Reports shall not be necessary for pilot projects. Prior to implementing a pilot project, the Corps of Engineers and the non-Federal sponsor shall prepare a Pilot Project Design Report.

(1) The Pilot Project Design Report shall contain the technical information necessary to construct the pilot project including engineering and design, cost estimates, real estate analyses, and appropriate NEPA documentation.

(2) The Pilot Project Design Report shall include a detailed operational testing and monitoring plan necessary to develop information to assist in better determining the technical feasibility of certain components prior to development of a Project Implementation Report.

(3) In accordance with § 385.18, the Corps of Engineers and the non-Federal sponsor shall provide the public with

opportunities to review and comment on the draft Pilot Project Design Report.

(4) The Corps of Engineers and the non-Federal sponsor shall approve the final Pilot Project Design Report in accordance with applicable law.

(d) Upon completion of operational testing and monitoring, the Corps of Engineers and the non-Federal sponsor shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, prepare a Pilot Project Technical Data Report, documenting the findings and conclusions from the operational testing and monitoring of the pilot project. The purpose of the Pilot Project Technical Data Report is to help assess the viability of technology and to assist in the development of the full-scale project. The Corps of Engineers and the non-Federal sponsor shall also consult with the South Florida Ecosystem Restoration Task Force in preparing the report.

(1) In accordance with § 385.22(b), the draft Pilot Project Technical Data Report shall be externally peer reviewed.

(2) In accordance with § 385.18, the public shall be provided with opportunities to review and comment on the draft Pilot Project Technical Data Report.

(3) The final Pilot Project Technical Data Report shall be made available to the public.

§ 385.13 Projects implemented under additional program authority.

(a) To expedite implementation of the Plan, the Corps of Engineers and non-Federal sponsors may implement projects under the authority of section 601(c) of WRDA 2000 that are described in the Plan and that will produce a substantial benefit to the restoration, preservation, and protection of the South Florida ecosystem.

(b) Each project implemented under the authority of section 601(c) of WRDA 2000 shall:

(1) In general, follow the process described in § 385.11;

(2) Not be implemented until a Project Implementation Report is prepared and approved in accordance with § 385.26; and

(3) Not exceed a total cost of \$25,000,000.

(c) The total aggregate cost of all projects implemented under the additional program authority shall not exceed \$206,000,000.

§ 385.14 Incorporation of NEPA and related considerations into the implementation process.

(a) *General.* (1) In implementing the Plan, the Corps of Engineers shall comply with the requirements of NEPA (42 U.S.C. 4371, *et seq.*) and applicable implementing regulations, including determining whether a specific action, when considered individually and cumulatively, will have a significant impact on the human environment.

(2) As appropriate, other agencies shall be invited to be cooperating agencies in the preparation of NEPA documentation pursuant to § 230.16 of this chapter.

(3) The District Engineer is the NEPA official responsible for compliance with NEPA for actions conducted to implement the Plan. Unless otherwise provided for by this part, NEPA coordination for implementation of the plan shall follow the NEPA procedures established in part 230 of this chapter.

(b) *Actions normally requiring an Environmental Impact Statement (EIS).*

(1) In addition to the actions listed in § 230.6 of this chapter, actions normally requiring an EIS are:

(i) Comprehensive Plan Modification Reports;

(ii) System Operating Manual or significant changes to the System Operating Manual;

(iii) Project Implementation Reports, including the draft Project Operating Manual when included in the Project Implementation Report;

(iv) Pilot Project Design Reports, including the detailed operational testing and monitoring plan; and

(v) Project Operating Manuals for any project where a Project Implementation Report is not prepared, or significant changes to Project Operating Manuals.

(2) The District Engineer may consider the use of an environmental assessment (EA) on the types of actions described in this paragraph if early studies and coordination show that a particular action, considered individually and cumulatively, is not likely to have a significant impact on the quality of the human environment.

(c) *Actions normally requiring an EA, but not necessarily an EIS.* In addition to the actions listed in § 230.7 of this chapter, actions normally requiring an EA, but not necessarily an EIS, are modifications to Project Operating Manuals or the System Operating Manual, that do not provide for significant change in operation and/or maintenance.

(d) *Categorical exclusions.* In addition to the activities listed in § 230.9 of this chapter, the following actions do not require separate NEPA documentation,

either because, when considered individually and cumulatively, they do not have significant effects on the quality of the human environment or because any such effects will already have been considered in NEPA documentation prepared in accordance with paragraphs (b) and (c) of this section. However, the District Engineer should be alert for extraordinary circumstances that may dictate the need to prepare an EA or an EIS. Even though an EA or EIS is not indicated for a Federal action because of a "categorical exclusion," that fact does not exempt the action from compliance with any other applicable Federal, State, or Tribal law, including but not limited to, the Endangered Species Act, the Fish and Wildlife Coordination Act, the National Historic Preservation Act, the Clean Water Act, Clean Air Act, the Coastal Zone Management Act, and the Marine Mammal Protection Act.

- (1) Project Cooperation Agreements;
- (2) Project Management Plans;
- (3) Program Management Plans;
- (4) Plans and specifications for

projects;

- (5) Pilot Project Technical Data Reports;

(6) Assessment reports prepared for the adaptive management program;

(7) Interim goals and interim targets;

(8) Development or revision of guidance memoranda or methods such as adaptive management, monitoring, plan formulation and evaluation, quantification of water needed for the natural system or protection of existing uses, methods of determining levels of flood protection, and similar guidance memoranda or methods; and

(9) Deviations from Operating Manuals for emergencies and unplanned minor deviations when, considered individually and cumulatively, they do not have significant effects on the quality of the human environment, as described in applicable Corps of Engineers regulations, including § 222.5(f)(4) and § 222.5(i)(5) of this chapter, and Engineer Regulation ER 1110-2-8156 "Preparation of Water Control Manuals."

§ 385.15 Consistency with requirements of the State of Florida.

The State of Florida has established procedures, requirements, and approvals that are needed before the State or the South Florida Water Management District can participate as the non-Federal sponsor for projects of the Plan. Project Implementation Reports shall include such information and analyses, consistent with this part, as are necessary to facilitate review and

approval of projects by the South Florida Water Management District and the State pursuant to the requirements of Florida law.

§ 385.16 Design agreements.

(a) The Corps of Engineers shall execute a design agreement with each non-Federal sponsor for the projects of the Plan prior to initiation of design activities with that non-Federal sponsor.

(b) Any procedures, guidance, or documents developed by the Corps of Engineers and the non-Federal sponsor pursuant to a design agreement shall be consistent with this part.

§ 385.17 Project Delivery Team.

(a) In accordance with the procedures of the Corps of Engineers business process described in Engineer Regulation ER 5-1-11 "US Army Corps of Engineers Business process," the Corps of Engineers and the non-Federal sponsor shall form a Project Delivery Team to develop the products necessary to implement each project.

(b) The Corps of Engineers shall assign, and the non-Federal sponsor may assign, a project manager to lead the Project Delivery Team.

(c) The Corps of Engineers and the South Florida Water Management District shall encourage the participation of other Federal, State, and local agencies and the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida on Project Delivery Teams, and use their expertise to ensure that information developed by the Project Delivery Team is shared with agencies, tribes, and the public at the earliest possible time in the implementation process. In forming the Project Delivery Team, the Corps of Engineers and the non-Federal sponsor shall request that the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies participate on the Project Delivery Team.

(1) In general, participation on the Project Delivery Team shall be the financial responsibility of the participating agency or tribe. However, the Corps of Engineers shall provide funding for the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to prepare Fish and Wildlife Coordination Act Reports, as required by applicable law, regulation, or agency procedures.

(2) Participation by an agency or tribe on the Project Delivery Team shall not

be considered or construed to be a substitute for consultation, coordination, or other activities required by applicable law or this part.

(d) Documents and work products prepared or developed by the Project Delivery Team shall not be self-executing, but shall be provided as information for consideration by the Corps of Engineers and the non-Federal sponsor, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies.

§ 385.18 Public outreach.

(a) *Goals.* (1) The goal of public outreach is to open and maintain channels of communication with the public throughout the implementation process for the Plan in order to:

(i) Provide information about proposed activities;

(ii) Make the public's desires, needs, and concerns known to decision-makers before decisions are reached; and

(iii) Consider and respond to the public's views in reaching decisions.

(2) In carrying out implementation activities for the Plan, the Corps of Engineers and non-Federal sponsors shall undertake outreach activities to:

(i) Increase general public awareness for the Plan;

(ii) Involve interested groups and interested communities in the decision-making process and incorporate public values into decisions;

(iii) Better serve and involve minority communities and traditionally underserved communities, persons with limited English proficiency, and socially and economically disadvantaged individuals;

(iv) Improve the substantive quality of decisions as a result of public participation; and

(v) Reduce conflict among interested and affected parties by building agreement or consensus on solutions to emerging issues.

(b) *General requirements.* (1) The Corps of Engineers and non-Federal sponsors shall provide a transparent, publicly accessible process through which scientific and technical information is used in the development of policy decisions throughout the implementation process for the Plan.

(2) The Corps of Engineers and non-Federal sponsors shall develop and conduct outreach activities for project or program-level activities in order to provide information to the public and to

provide opportunities for involvement by the public.

(3) The Corps of Engineers and non-Federal sponsors shall monitor the effectiveness of outreach activities throughout the implementation process.

(4) Project Management Plans and Program Management Plans shall include information concerning any outreach activities to be undertaken during the implementation of the project or activity.

(5) Project Delivery Team meetings and RECOVER meetings shall be open to attendance by the public. The public shall be notified in advance of these meetings through e-mail, posting on a web site, or other appropriate means. The public shall be provided with an opportunity to comment at such meetings.

(6) Public meetings and workshops shall be held at such times and locations as to facilitate participation by the public.

(7) The Corps of Engineers and non-Federal sponsors shall provide opportunities for the public to review and comment on draft documents.

(c) *Outreach to socially and economically disadvantaged individuals and communities.*

(1) The Corps of Engineers and non-Federal sponsors shall develop and conduct public outreach activities to ensure that socially and economically disadvantaged individuals, including individuals with limited English proficiency, and communities are provided opportunities to review and comment during implementation of the Plan.

(2) The Corps of Engineers and non-Federal sponsors shall monitor the effectiveness of outreach activities conducted to ensure that socially and economically disadvantaged individuals and communities, including individuals with limited English proficiency, are provided opportunities to review and comment during implementation of the Plan.

(3) Project Management Plans and Program Management Plans shall include information, concerning any outreach activities to be undertaken during the implementation of the project or activity, to socially and economically disadvantaged individuals and communities, including individuals of limited English proficiency.

(4) The Corps of Engineers and non-Federal sponsors shall make project and program information available in languages other than English where a significant number of individuals in the area affected by the project or program activity are expected to have limited English proficiency.

(5) The Corps of Engineers and non-Federal sponsors shall provide translators or similar services at public meetings where a significant number of participants are expected to have limited English proficiency.

§ 385.19 Environmental and economic equity.

(a) Project Management Plans and Program Management Plans shall include information concerning any environmental and economic equity activities to be undertaken during the implementation of the project or activity.

(b) As required by applicable laws and policies, the Corps of Engineers and non-Federal sponsors shall consider and evaluate environmental justice issues and concerns in the implementation of projects.

(c) During the implementation of the Plan, through appropriate means, consistent with section 601(k) of WRDA 2000 and other provisions of Federal law, the Corps of Engineers and non-Federal sponsors shall provide information to socially and economically disadvantaged individuals and communities, including individuals with limited English proficiency, about potential or anticipated contracting opportunities that are expected to result from implementation of the Plan.

(d) The District Engineer shall ensure that small business concerns owned and controlled by socially and economically disadvantaged individuals are provided opportunities to participate under section 15(g) of the Small Business Act (15 U.S.C. 644(g)) throughout the implementation process. The District Engineer shall track the amount of contracts awarded to small business concerns owned and controlled by socially and economically disadvantaged individuals in order to ensure that they are provided such opportunities.

§ 385.20 Restoration Coordination and Verification (RECOVER).

(a) RECOVER (Restoration Coordination and Verification) is an interagency and interdisciplinary scientific and technical team described in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999. RECOVER was established by the Corps of Engineers and the South Florida Water Management District to conduct assessment, evaluation, and planning and integration activities using the best available science that support implementation of the Plan with the overall goal of ensuring that the goals

and purposes of the Plan are achieved. RECOVER has been organized into a Leadership Group that provides management and coordination for the activities of RECOVER and teams that accomplish activities such as: developing system-wide performance measures; developing and implementing the monitoring and assessment program; evaluating alternatives developed by Project Delivery Teams to achieve the goals and purposes of the Plan; conducting system-wide water quality analyses; developing, refining, and applying system-wide models and tools; and evaluating modifications to the Plan. RECOVER is not a policy making body, but has technical and scientific responsibilities that support implementation of the Plan.

(b) Documents or work products prepared or developed by RECOVER shall not be self-executing, but shall be provided as information for consideration by the Corps of Engineers and the South Florida Water Management District, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies. Technical information developed by RECOVER shall be available to the public.

(c) The Corps of Engineers and the South Florida Water Management District shall encourage the participation of other Federal, State, and local agencies and the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida on RECOVER, to use their expertise, to ensure that information developed by RECOVER is shared at the earliest possible time with agencies, tribes, and the public, and to ensure that matters of concern are addressed as early as possible. The Corps of Engineers and the South Florida Water Management District recognize the special role of the National Oceanic and Atmospheric Administration of the Department of Commerce, the Florida Fish and Wildlife Conservation Commission, the Department of the Interior and the Florida Fish and Wildlife Conservation Commission as stewards of the natural system and for their technical and scientific activities in support of restoration. The Corps of Engineers and the South Florida Water Management District recognize the special role of the Environmental Protection Agency and the Florida Department of Environmental Protection in water quality issues. Accordingly, the Corps of

Engineers and the South Florida Water Management District have used and will continue to use the Department of the Interior, the Department of Commerce, the Florida Fish and Wildlife Conservation Commission, the Environmental Protection Agency, and the Florida Department of Environmental Protection as co-chairs along with the Corps of Engineers and the South Florida Water Management District on the appropriate technical teams that have been established to date as part of RECOVER.

(1) In general, participation on RECOVER shall be the financial responsibility of the participating agency or tribe.

(2) Participation by an agency or tribe on RECOVER shall not be considered or construed to be a substitute for consultation, coordination, or other activities required by applicable law, policy, or regulation.

(d) The Corps of Engineers and the South Florida Water Management District shall:

(1) Assign program managers from the Corps of Engineers and the South Florida Water Management District to be responsible for carrying out the activities of RECOVER; and

(2) Establish a RECOVER Leadership Group to assist the program managers in coordinating and managing the activities of RECOVER, including the establishment of sub-teams or other entities, and in reporting on the activities of RECOVER. In addition to the program managers, the RECOVER Leadership Group shall, consist of one member appointed by each of the following:

- (i) Environmental Protection Agency;
- (ii) National Oceanic and Atmospheric Administration;
- (iii) U.S. Fish and Wildlife Service;
- (iv) U.S. Geological Survey;
- (v) National Park Service;
- (vi) Miccosukee Tribe of Indians of Florida;
- (vii) Seminole Tribe of Florida;
- (viii) Florida Department of Agriculture and Consumer Services;
- (ix) Florida Department of Environmental Protection; and
- (x) Florida Fish and Wildlife Conservation Commission.

(3) As necessary to assist the program managers, the Corps of Engineers and the South Florida Water Management District may add additional members to the RECOVER Leadership Group.

(e) RECOVER shall perform assessment, evaluation, and planning and integration activities as described in this paragraph.

(1) *Assessment activities.* In accordance with § 385.31, RECOVER

shall conduct credible scientific assessments of hydrological, water quality, biological, ecological, water supply, and other responses to the Plan. The Corps of Engineers and the South Florida Water Management District will ensure that these assessments incorporate the best available science and that the results are provided for external peer review, as appropriate, and are made fully available for public review and comment. RECOVER shall conduct assessment activities, including, but not limited to:

(i) Developing proposed assessment performance measures for assessing progress towards the goals and purposes of the Plan;

(ii) Developing a proposed monitoring plan to support the adaptive management program;

(iii) Conducting monitoring and assessment activities as part of the adaptive management program to assess the actual performance of the Plan;

(iv) Developing recommendations for interim goals in accordance with § 385.38;

(v) Assessing progress towards achieving the interim goals established pursuant to § 385.38;

(vi) Developing recommendations for interim targets in accordance with § 385.39;

(vii) Assessing progress towards achieving the interim targets established pursuant to § 385.39; and

(viii) Cooperating with the independent scientific review panel and external peer review in accordance with § 385.22.

(2) *Evaluation activities.* In accordance with § 385.26(c) and § 385.32, RECOVER shall assist Project Delivery Teams in ensuring that project design and performance is fully linked to the goals and purposes of the Plan and incorporating, as appropriate, information developed for Project Implementation Reports into the Plan. RECOVER shall conduct evaluation activities, including, but not limited to:

(i) Developing proposed evaluation performance measures for evaluating alternative plans developed for the Project Implementation Report;

(ii) Conducting evaluations of alternative plans developed for Project Implementation Reports and Comprehensive Plan Modification Reports; and

(iii) Supporting development and refinement of predictive models and tools used in the evaluation of alternate plans developed by the Project Delivery Teams.

(3) *Planning and integration activities.* RECOVER shall conduct planning and integration activities, in accordance

with § 385.31, in support of the adaptive management program as a basis for identifying opportunities for improving the performance of the Plan and other appropriate planning and integration activities associated with implementation of the Plan. RECOVER shall conduct planning and integration activities, including, but not limited to:

(i) Developing and refining conceptual and predictive models and tools in support of the integration of new science into the adaptive management program;

(ii) Reviewing and synthesizing new information and science that could have an effect on the Plan;

(iii) Developing proposed refinements and improvements in the design or operation of the Plan during all phases of implementation;

(iv) Preparing technical information to be used in the development of the periodic reports to Congress prepared pursuant to § 385.40; and

(v) Analyzing proposed revisions to the Master Implementation Sequencing Plan.

(f) In carrying out the functions described in this section, RECOVER shall consider the effects of activities and projects that are not part of the Plan, but which could affect the ability of the Plan to achieve its goals and purposes.

(g) As appropriate, the Corps of Engineers and the South Florida Water Management District shall seek external peer review of RECOVER activities in accordance with § 385.22(b).

§ 385.21 Quality control.

(a) The Corps of Engineers and the non-Federal sponsor shall prepare a quality control plan, in accordance with applicable Corps of Engineers regulations, for each product that will be produced by a Project Delivery Team. The quality control plan shall be included in the Project Management Plan and shall describe the procedures to be used to ensure compliance with technical and policy requirements during implementation.

(b) During development of the Project Management Plan for each project, the Corps of Engineers and the non-Federal sponsor shall establish a Technical Review Team to conduct reviews to ensure that products are consistent with established criteria, guidance, procedures, and policy. The members of the Technical Review Team shall be independent of the Project Delivery Team and the project being reviewed, and should be knowledgeable of design criteria established for the Plan.

(c) Technical review is intended to be a continuous process throughout project

implementation. The Technical Review Team shall document its actions and recommendations and provide reports to the Project Delivery Team at designated points during the implementation process that shall be described in the quality control plan.

§ 385.22 Independent scientific review and external peer review.

(a) *The independent scientific review panel required by section 601(j).* (1) Section 601(j) of WRDA 2000 requires that the Secretary of the Army, the Secretary of the Interior, and the Governor, in consultation with the South Florida Ecosystem Restoration Task Force, establish an independent scientific review panel, convened by a body, such as the National Academy of Sciences, to review the Plan's progress toward achieving the natural system restoration goals of the Plan. Section 601(j) also directs that this panel produce a biennial report to Congress, the Secretary of the Army, the Secretary of the Interior, and the Governor that includes an assessment of ecological indicators and other measures of progress in restoring the ecology of the natural system, based on the Plan.

(2) To carry out section 601(j), the Department of the Army, the Department of the Interior, and the State shall establish an independent scientific review panel to conduct on-going review of the progress achieved by the implementation of the Plan in achieving the restoration goals of the Plan and shall provide the panel with the resources and cooperation necessary to ensure that the panel is able to function effectively.

(3) Not later than June 14, 2004, the Secretary of the Army, the Secretary of the Interior, and the Governor, in consultation with the South Florida Ecosystem Restoration Task Force, shall enter into a five-year agreement, with options for extensions in five-year increments, with the National Academy of Sciences to convene this panel.

(4) The Department of the Army, the Department of the Interior, and the State expect that the National Academy of Sciences will use established practices for assuring the independence of members and that the review panel will include members reflecting a balance of the knowledge, training, and experience suitable to comprehensively review and assess progress towards achieving natural system restoration goals of the Plan.

(5) To ensure the independence of the section 601(j) panel, its sole mission shall be to review the Plan's progress toward achieving the natural system restoration goals of the Plan and to

produce a biennial report to Congress, the Secretary of the Army, the Secretary of the Interior, and the Governor that includes an assessment of ecological indicators and other measures of progress in restoring the ecology of the natural system, based on the Plan. The Secretary of the Army, the Secretary of the Interior, the Governor, and the South Florida Ecosystem Restoration Task Force and its members, shall not attempt to influence the panel's review or assign this panel any other tasks, nor request any advice on any other matter, nor shall this panel accept any other tasks nor provide advice on any other matter, to any entity, whether Federal, State or local, whether public or private.

(6) Before final establishment of the panel, the Department of the Army, the Department of the Interior, and the State, in consultation with the South Florida Ecosystem Restoration Task Force, shall be afforded the opportunity to review the list of panel members convened by the National Academy of Sciences.

(7) The agreement shall recognize that the Department of the Army, the Department of the Interior, and the State retain the right and ability to establish other independent scientific review panels or external peer reviews when deemed necessary by those agencies for conducting specific scientific and technical reviews.

(8) The Department of the Army, the Department of the Interior, and the State of Florida shall share the panel's costs. The Department of the Army and the Department of the Interior shall enter into a separate Memorandum of Agreement that will specify how the Federal agencies will pay the Federal share of these costs. The State's fifty percent share shall be accounted for in the design agreement between the Corps of Engineers and the South Florida Water Management District.

(9) The panel shall produce a biennial report to Congress, the Secretary of the Army, the Secretary of the Interior, and the Governor, pursuant to section 601(j) of WRDA 2000, that includes an assessment of ecological indicators and other measures of progress in restoring the ecology of the natural system, based on the Plan.

(10) The Corps of Engineers and the South Florida Water Management District and other non-Federal sponsors shall cooperate with the independent scientific review panel, including responding to reasonable requests for information concerning the implementation of the Plan.

(11) The Secretary of the Army, the Secretary of the Interior, and the Governor shall consult with the South

Florida Ecosystem Restoration Task Force in their decision to exercise each five-year option to extend the agreement with the National Academy of Sciences. Upon expiration of the agreement, the Secretary of the Army, the Secretary of the Interior, and the Governor shall consult the South Florida Ecosystem Restoration Task Force in selection of another body to convene the independent scientific review panel required by section 601(j) of WRDA 2000.

(b) *External peer review.* (1) The Department of the Army, the Department of the Interior, the South Florida Water Management District, and other Federal, State, and local agencies, the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida may initiate an external peer review process to review documents, reports, procedures, or to address specific scientific or technical questions or issues relating to their jurisdiction.

(2) In accordance with § 385.12(d), draft Pilot Project Technical Reports shall be externally peer reviewed.

(3) In accordance with § 385.31(b), draft assessment reports prepared for the adaptive management program shall be externally peer reviewed.

§ 385.23 Dispute resolution.

(a) Disputes with the non-Federal sponsor concerning a Project Cooperation Agreement shall be resolved under the specific dispute resolution procedures of that Project Cooperation Agreement.

(b) Disputes with the non-Federal sponsor concerning design activities shall be resolved under the specific dispute resolution procedures of the design agreement.

(c) All other unresolved issues with the non-Federal sponsor and disputes with the State associated with the implementation of the Plan shall be resolved according to the terms of the Dispute Resolution Agreement executed on September 9, 2002 pursuant to section 601(i) of WRDA 2000.

(d) For disputes with parties not covered by the provisions of paragraphs (a), (b), or (c) of this section, the Corps of Engineers shall attempt to resolve the dispute in accordance with applicable statutory requirements and/or the following procedures:

(1) The parties will attempt to resolve disputes at the lowest organizational level before seeking to elevate a dispute.

(2) Any disputed matter shall first be elevated to the District Engineer and the equivalent official of the other agency, or their designees. The parties may decide to continue to elevate the dispute to higher levels within each agency.

(3) The parties to a dispute may agree to participate in mediation.

(4) When a dispute is resolved the parties shall memorialize the resolution in writing.

§ 385.24 Project Management Plans.

(a) *General requirements.* (1) The Corps of Engineers and the non-Federal sponsor shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop a Project Management Plan prior to initiating activities on a project.

(2) The Project Management Plan shall define the activities, and where appropriate, the subordinate tasks, as well as the assignment of responsibility for completing products and activities such as Project Implementation Reports, Pilot Project Design Reports, plans and specifications, real estate acquisition, construction contracts and construction, Comprehensive Plan Modification Reports, and other activities necessary to support implementation of the Plan.

(3) The Project Management Plan shall include a quality control plan, as described in § 385.21.

(4) As appropriate, the Project Management Plan shall include activities to be conducted to meet the requirements of the Fish and Wildlife Coordination Act, as described in § 385.26(e).

(5) The Project Management Plan shall provide schedule and funding information for the project.

(6) In accordance with § 385.18, Corps of Engineers and the non-Federal sponsor shall provide opportunities for the public to review and comment on the Project Management Plan.

(b) *Revisions to Project Management Plans.* The Corps of Engineers and the non-Federal sponsor may, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, revise the Project Management Plan whenever necessary, including after completion of the Project Implementation Report, or Plans and Specifications. In accordance with § 385.18, the Corps of Engineers and the non-Federal sponsor shall provide opportunities for the public to review and comment on revisions to the Project Management Plan.

§ 385.25 Program Management Plans.

(a) *General requirements.* (1) The Corps of Engineers and the non-Federal sponsor shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop a Program Management Plan prior to initiating a program-level activity.

(2) The Program Management Plan shall define the activities, and where appropriate, the subordinate tasks, as well as the assignment of responsibility for completing products developed in support to program-level activities.

(3) In accordance with § 385.18, Corps of Engineers and the non-Federal sponsor shall provide opportunities for the public to review and comment on the Program Management Plan.

(b) *Revisions to Program Management Plans.* The Corps of Engineers and the non-Federal sponsor may, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, revise the Program Management Plan whenever necessary to incorporate new or changed information that affects the scope, schedule, or budget of the activities described in the Program Management Plan. In accordance with § 385.18, the Corps of Engineers and the non-Federal sponsor shall provide opportunities for the public to review and comment on revisions to the Program Management Plan.

§ 385.26 Project Implementation Reports.

(a) *General requirements.* (1) The Project Implementation Report is a document that provides information on plan formulation and evaluation, engineering and design, estimated benefits and costs, environmental effects, and the additional information and analysis necessary for the Secretary of the Army to approve the project for implementation, or for Congress to authorize the project for implementation. The Project Implementation Report bridges the gap between the conceptual level of detail contained in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999 and the detailed design necessary to prepare plans and specifications required to proceed to

construction. Prior to requesting approval or authorization for the implementation of a project, the Corps of Engineers and the non-Federal sponsor shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, complete a Project Implementation Report addressing the project's justification in accordance with section 601(f)(2) of WRDA 2000, and other factors required by section 601(h)(4)(A) of WRDA 2000. To eliminate duplication with State and local procedures, the Project Implementation Report shall also address the factors of relevant State laws, including sections 373.1501 and 373.470 of the Florida Statutes.

(2) Before completion of the draft Project Implementation Report, the Corps of Engineers and the non-Federal sponsor shall provide the South Florida Ecosystem Restoration Task Force with information about the alternative plans developed and evaluated for the Project Implementation Report.

(3) The Project Implementation Report shall:

(i) Be consistent with the Plan and applicable law, policy, and regulation, including the Principles and Guidelines of the Water Resources Council, as modified by section 601(f)(2)(A) of WRDA 2000;

(ii) Be based on the best available science;

(iii) Comply with all applicable Federal, State, and Tribal laws;

(iv) Contain sufficient information for proceeding to final design of the project, such as: additional plan formulation and evaluation, environmental and/or economic benefits, engineering and design, costs, environmental impacts, real estate requirements, and the preparation of the appropriate National Environmental Policy Act documentation;

(v) Contain the information necessary to determine that the activity is justified by the environmental benefits derived by the South Florida ecosystem in accordance with section 601(f)(2)(A) and/or that the benefits of the project are commensurate with costs, and that the project is cost-effective;

(vi) Comply, in accordance with section 601(b)(2)(A)(ii) of WRDA 2000, with applicable water quality standards and applicable water quality permitting requirements;

(vii) Identify, in accordance with § 385.35, the appropriate quantity,

timing, and distribution of water dedicated and managed for the natural system;

(viii) Identify, in accordance with § 385.35, the amount of water to be reserved or allocated for the natural system under State law necessary to implement the provisions in paragraphs (a)(3)(vi) and (vii) of this section;

(ix) Identify the quantity, timing, and distribution of water made available for other water-related needs of the region;

(x) Determine, in accordance with § 385.36, if existing legal sources of water are to be eliminated or transferred;

(xi) Determine, in accordance with § 385.37(b) that implementation of the selected alternative will not reduce levels of service for flood protection that:

(A) Were in existence on the date of enactment of section 601 of WRDA 2000; and

(B) Are in accordance with applicable law; and consider, as appropriate, in accordance with § 385.37(c), opportunities to provide additional flood protection;

(xii) Include an assessment of the monetary and non-monetary benefits and costs, optimization and justification, cost-effectiveness, and engineering feasibility of the project;

(xiii) Include a discussion of any significant changes in cost or scope of the project from that presented in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999;

(xiv) Include an analysis, prepared by RECOVER as described in paragraph (c) of this section, of the project's contributions towards achieving the goals and purposes of the Plan, including, as appropriate, suggestions for improving the performance of the alternative plans;

(xv) Describe how the project contributes to the achievement of interim goals established pursuant to § 385.38 and the interim targets established pursuant to § 385.39;

(xvi) Include, in accordance with § 385.28(c), a draft Project Operating Manual as an appendix; and

(xvii) Include, as appropriate, information necessary for the non-Federal sponsor to address the requirements of Chapter 373 of the Florida Statutes, and other applicable planning and reporting requirements of Florida law.

(4) The Corps of Engineers and the non-Federal sponsor shall develop the Project Implementation Report generally in accordance with the process shown in figure 2 in Appendix A of this part.

(5) The Corps of Engineers and the South Florida Water Management District shall develop a guidance memorandum in accordance with § 385.5 for approval by the Secretary of the Army, with the concurrence of the Secretary of the Interior and the Governor, that describes the major tasks that are generally needed to prepare a Project Implementation Report and the format and content of a Project Implementation Report.

(b) *Formulation and evaluation.* In preparing a Project Implementation Report, the Corps of Engineers and the non-Federal sponsor shall formulate and evaluate alternative plans to optimize the project's contributions towards achieving the goals and purposes of the Plan, and to develop justified and cost-effective ways to achieve the benefits of the Plan.

(1) *General.* The Corps of Engineers and the South Florida Water Management District shall develop a guidance memorandum in accordance with § 385.5 for approval by the Secretary of the Army, with the concurrence of the Secretary of the Interior and the Governor, that describes the processes to be used to formulate and evaluate alternative plans and their associated monetary and non-monetary benefits and costs, determine cost-effectiveness and optimize the project's contribution towards achieving the goals and purposes of the Plan, and the basis for justifying and selecting an alternative to be recommended for implementation. The guidance memorandum shall also provide a process for evaluating projects that are outside the boundary of regional computer models or projects whose effects cannot be captured in regional computer models. Project Implementation Reports approved by the Secretary of the Army before December 12, 2003 or before the development of the guidance memorandum may use whatever method that, in the Secretary of the Army's discretion, is deemed appropriate and is consistent with applicable law, policy, and regulations.

(2) *Project formulation and evaluation.* The guidance memorandum shall describe the process for formulating and evaluating alternative plans for their ability to optimize contributions for achieving the goals and purposes of the Plan. The guidance memorandum shall describe the process for including each alternative plan with all of the other components of the Plan and evaluating the total monetary and non-monetary benefits and costs of the resulting comprehensive plan when compared to the without CERP

condition. In formulating alternative plans to be evaluated, the project as described in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999 shall be included as one of the alternative plans that is evaluated. For the selected plan, the guidance memorandum shall also describe the process for evaluating that plan as the next-added increment of the Plan.

(3) *Identification of selected alternative plan.* The guidance memorandum shall also include a process for identification of a selected alternative plan, based on the analyses conducted in paragraph (b)(2) of this section. The alternative plan to be selected should be the plan that maximizes net benefits, both monetary and non-monetary, on a system-wide basis, provided that this plan is justified on a next-added increment basis. Alternative plans that are not justified on a next-added increment basis shall not be selected. The guidance memorandum shall describe an iterative process for evaluating and/or combining alternative options until an alternative is identified that maximizes net benefits while still providing benefits that justify costs on a next-added increment basis.

(c) *RECOVER performance evaluation of alternative plans.* (1) Prior to the identification of a selected alternative plan, RECOVER shall evaluate the performance of alternative plans towards achieving the goals and purposes of the Plan.

(2) RECOVER shall prepare information for the Project Delivery Team describing the results of the evaluations of alternative plans developed for the Project Implementation Report towards achieving the goals and purposes of the Plan, including, as appropriate, suggestions for improving the performance of the alternative plans.

(d) *NEPA documentation for Project Implementation Reports.* (1) The Corps of Engineers and the non-Federal sponsor shall prepare the appropriate NEPA document to accompany the Project Implementation Report. The NEPA document shall contain an analysis of the effects of the alternatives formulated for the Project Implementation Report. The NEPA document for the Project Implementation Report shall use the Programmatic Environmental Impact Statement included in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999, as appropriate, for the purpose of tiering as described in § 230.14(c) of this chapter.

(2) The District Engineer shall prepare the Record of Decision for Project Implementation Reports. Review and signature of the Record of Decision shall follow the same procedures as for review and approval of feasibility reports in § 230.14 of this chapter and other applicable Corps of Engineers regulations.

(e) *Fish and Wildlife Coordination Act Requirements.* (1) The Corps of Engineers and the non-Federal sponsor shall coordinate with the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the Florida Fish and Wildlife Conservation Commission, and other appropriate agencies in the preparation of a Project Implementation Report, as required by applicable law.

(2) The Project Management Plan shall include a discussion of activities to be conducted for compliance with the Fish and Wildlife Coordination Act and other applicable laws.

(3) Consistent with applicable law, policy, and regulations, coordination shall include preparation of the following documents as shown in figure 2 in Appendix A of this part:

(i) Planning Aid Letter that describes issues and opportunities related to the conservation and enhancement of fish and wildlife resources; and

(ii) Draft and final Fish and Wildlife Coordination Act Reports that provide the formal views and recommendations of the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, and the Florida Fish and Wildlife Conservation Commission on alternative plans.

(f) *Project Implementation Report review and approval process.* (1) The Corps of Engineers and the non-Federal sponsor shall provide opportunities for the public to review and comment on the draft Project Implementation Report and NEPA document, in accordance with § 385.18 and applicable law and Corps of Engineers policy.

(2) The Project Implementation Report shall contain an appropriate letter of intent from the non-Federal sponsor indicating concurrence with the recommendations of the Project Implementation Report.

(3) Upon the completion of the Project Implementation Report and NEPA document, the District Engineer shall submit the report and NEPA document to the Division Engineer.

(4) Upon receipt and approval of the Project Implementation Report the Division Engineer shall issue a public notice announcing completion of the Project Implementation Report based upon:

(i) The Division Engineer's endorsement of the findings and

recommendations of the District Engineer; and

(ii) The Division Engineer's assessment that the project has been developed and the report prepared in accordance with current law and policy. The notice shall indicate that the report has been submitted to Corps of Engineers Headquarters for review.

(5) Headquarters, U.S. Army Corps of Engineers shall conduct a review in accordance with applicable policies and regulations of the Corps of Engineers. Headquarters, U.S. Army Corps of Engineers shall administer the 30-day state and agency review of the Project Implementation Report, and as appropriate, file the Environmental Impact Statement with the Environmental Protection Agency.

(6) After completion of the review and other requirements of law and policy, the Chief of Engineers shall submit the Project Implementation Report and the Chief of Engineers' recommendations on the project to the Assistant Secretary of the Army for Civil Works.

(7) The Assistant Secretary of the Army for Civil Works shall review all Project Implementation Reports, and shall, prior to either approving them or submitting the Assistant Secretary's recommendations to Congress, coordinate the project and proposed recommendations with the Office of Management and Budget.

(i) For projects authorized by section 601(c) of WRDA 2000, the Assistant Secretary of the Army for Civil Works shall review and approve the Project Implementation Report prior to implementation of the project.

(ii) For projects authorized by section 601(b)(2)(C) of WRDA 2000, the Assistant Secretary of the Army for Civil Works shall review the Project Implementation Report prior to submitting the Assistant Secretary's recommendations to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Environment and Public Works of the Senate for approval.

(iii) For all other projects, the Assistant Secretary of the Army for Civil Works shall review the Project Implementation Report prior to submitting the Assistant Secretary's recommendations regarding authorization to Congress.

§ 385.27 Project Cooperation Agreements.

(a) *General.* Prior to initiating construction or implementation of a project, the Corps of Engineers shall execute a Project Cooperation Agreement with the non-Federal sponsor in accordance with applicable law.

(b) *Verification of water reservations.* The Project Cooperation Agreement shall include a finding that the South Florida Water Management District or the Florida Department of Environmental Protection has executed under State law the reservation or allocation of water for the natural system as identified in the Project Implementation Report. Prior to execution of the Project Cooperation Agreement, the District Engineer shall verify in writing that the South Florida Water Management District or the Florida Department of Environmental Protection has executed under State law the reservation or allocation of water for the natural system as identified in the Project Implementation Report. The District Engineer's verification shall provide the basis for the finding in the Project Cooperation Agreement and be made available to the public.

(c) *Changes to water reservations.* Reservations or allocations of water are a State responsibility. Any change to the reservation or allocation of water for the natural system made under State law shall require an amendment to the Project Cooperation Agreement.

(1) The District Engineer shall, in consultation with the South Florida Water Management District, the Florida Department of Environmental Protection, the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, and other Federal, State, and local agencies, verify in writing that the revised reservation or allocation continues to provide for an appropriate quantity, timing, and distribution of water dedicated and managed for the natural system after considering any changed circumstances or new information since completion of the Project Implementation Report. In accordance with applicable State law, the non-Federal sponsor shall provide opportunities for the public to review and comment on any proposed changes in the water reservation made by the State.

(2) The Secretary of the Army shall notify the appropriate committees of Congress whenever a change to the reservation or allocation of water for the natural system executed under State law as described in the Project Implementation Report has been made. Such notification shall include the Secretary's and the State's reasons for determining that the revised reservation or allocation continues to provide for an appropriate quantity, timing, and distribution of water dedicated and managed for the natural system after

considering any changed circumstances or new information since completion of the Project Implementation Report. The Secretary of the Army's notification to the appropriate committees of Congress shall be made available to the public.

(d) *Savings clause provisions.* The Project Cooperation Agreement shall ensure that the Corps of Engineers and the non-Federal sponsor not:

(1) Eliminate or transfer existing legal sources of water until a new source of comparable quantity and quality as that available on the date of enactment of WRDA 2000 is available to replace the water to be lost as a result of implementation of the Plan; and

(2) Reduce levels of service for flood protection that are:

(i) In existence on the date of enactment of WRDA 2000; and

(ii) In accordance with applicable law.

§ 385.28 Operating Manuals.

(a) *General provisions.* (1) The Corps of Engineers and the non-Federal sponsor shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop Operating Manuals to ensure that the goals and purposes of the Plan are achieved.

(2) Operating Manuals shall consist of a System Operating Manual and Project Operating Manuals. In general, the System Operating Manual provides a system-wide operating plan for the operation of the projects of the Plan and other C&SF Project features and the Project Operating Manuals provide the details necessary for integrating the operation of the individual projects with the system operation described in the System Operating Manual.

(3) In accordance with § 385.18, the public shall have the opportunity to review and comment on draft Operating Manuals.

(4) The Division Engineer and the non-Federal sponsor shall approve completed Operating Manuals.

(5) The Corps of Engineers and the South Florida Water Management District shall develop a guidance memorandum in accordance with § 385.5 for approval by the Secretary of the Army, with the concurrence of the Secretary of the Interior and the Governor, that describes the content of Operating Manuals and the tasks necessary to develop Operating Manuals.

(6) Operating Manuals shall:

(i) Be consistent with the goals and purposes of the Plan;

(ii) Comply with NEPA, in accordance with § 385.14.

(iii) Describe regulation schedules, water control, and operating criteria for a project, group of projects, or the entire system;

(iv) Make provisions for the natural fluctuation of water made available in any given year and fluctuations necessary for the natural system as described in the Plan;

(v) Be consistent with applicable water quality standards and applicable water quality permitting requirements;

(vi) Be consistent with the reservation or allocation of water for the natural system and the savings clause provisions described in the Project Implementation Report and the Project Cooperation Agreement and the provisions of § 385.35(b), § 385.36, and § 385.37 and reflect the operational criteria used in the identification of the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system;

(vii) Include a drought contingency plan as required by § 222.5(i)(5) of this chapter and Engineer Regulation ER 1110-2-1941 "Drought Contingency Plans" that is consistent with the Water Rights Compact Among the Seminole Tribe of Florida, the State of Florida, and the South Florida Water Management District and Florida Administrative Code Section 40E-21 (Water Shortage Plan) and Florida Administrative Code Section 40E-22 (Regional Water Shortage Plan); and

(viii) Include provisions authorizing temporary short-term deviations from the Operating Manual for emergencies and unplanned circumstances, as described in applicable Corps of Engineers regulations, including § 222.5(f)(4) and § 222.5(i)(5) of this chapter, and Engineer Regulation ER 1110-2-8156 "Preparation of Water Control Manuals." However, deviations shall be minimized by including planning for flooding events caused by rainfall and hurricane events, as well as by including a drought contingency plan.

(A) *Emergency deviations.* Examples of some emergencies that can be expected to occur at a project are: drowning and other accidents, failure of the operation facilities, chemical spills, treatment plant failures and other temporary pollution problems. Water control actions necessary to abate the problem are taken immediately unless such action would create equal or worse conditions.

(B) *Unplanned circumstances.* There are unplanned circumstances that create

a temporary need for minor deviations from the Operating Manual, although they are not considered emergencies. Deviations are sometimes necessary to carry out maintenance and inspection of facilities. Requests for deviations for unplanned circumstances generally involve time periods ranging from a few hours to a few days. Approval of these changes shall be obtained from the Division Engineer.

(7) Except as provided in this part, operating manuals generally shall follow the procedures for water control plans in § 222.5 of this chapter and applicable Corps of Engineers regulations for preparation of water control manuals and regulation schedules, including Engineer Regulation ER 1110-2-8156.

(b) *System Operating Manual.* (1) Not later than December 31, 2005, the Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop a System Operating Manual that provides a system-wide operating plan for the operation of implemented projects of the Plan and other Central and Southern Florida Project features to ensure that the goals and purposes of the Plan are achieved.

(2) The System Operating Manual shall initially be based on the existing completed Central and Southern Florida Project features and shall be developed by the Corps of Engineers as provided in § 222.5(g) of this chapter and by the South Florida Water Management District as its laws and regulations require. Existing water control plans, regulation schedules, and Master Water Control Plans for the Central and Southern Florida Project shall remain in effect until approval of the System Operating Manual.

(3) The System Operating Manual shall be revised whenever the Corps of Engineers and the South Florida Water Management District, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, believe it is necessary to ensure that the goals and purposes of the Plan are achieved.

(4) Except as provided in this part, the System Operating Manual shall follow

the procedures for preparation of water control manuals, regulation schedules and Master Water Control Manuals in § 222.5 of this chapter and applicable Corps of Engineers regulations.

(5) The Corps of Engineers and the South Florida Water Management District shall provide notice and opportunity for public comment for any significant modification to the System Operating Manual.

(c) *Project Operating Manuals.* (1) The Corps of Engineers and the non-Federal sponsor shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop a Project Operating Manual for each project of the Plan that is implemented.

(2) Project Operating Manuals shall be considered supplements to the System Operating Manual, and present aspects of the projects not common to the system as a whole.

(3) Each Project Implementation Report shall, as appropriate, include a draft Project Operating Manual as an appendix to the Project Implementation Report.

(4) As appropriate, the draft Project Operating Manual shall be revised for the project construction phase and the operational monitoring and testing phase after completion of project construction.

(5) The final Project Operating Manual shall be completed as soon as practicable after completion of the operational testing and monitoring phase of the project. The completed project shall continue to be operated in accordance with the approved draft Project Operating Manual until the final Project Operating Manual is approved.

(6) The Corps of Engineers and the non-Federal sponsor shall provide notice and opportunity for public comment for any significant modification to the Project Operating Manual.

§ 385.29 Other project documents.

(a) As appropriate, the Corps of Engineers and the non-Federal sponsor may prepare design documents to provide additional design information needed for projects. Such documents shall be approved in accordance with applicable policies of the Corps of Engineers and the non-Federal sponsor.

(b) The Corps of Engineers and the non-Federal sponsor shall prepare plans and specifications necessary for construction of projects. Such

documents shall be approved in accordance with applicable policies of the Corps of Engineers and the non-Federal sponsor.

(c) The Corps of Engineers and the non-Federal sponsor may prepare other documents as appropriate during the real estate acquisition and construction phases for projects. Such documents shall be approved in accordance with applicable policies of the Corps of Engineers and the non-Federal sponsor.

Subpart D—Incorporating New Information Into the Plan

§ 385.30 Master Implementation Sequencing Plan.

(a) Not later than December 13, 2004 the Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop a Master Implementation Sequencing Plan that includes the sequencing and scheduling for implementation of all of the projects of the Plan, including pilot projects and operational elements, based on the best scientific, technical, funding, contracting, and other information available. The Corps of Engineers and the South Florida Water Management District shall also consult with the South Florida Ecosystem Restoration Task Force in preparing the Master Implementation Sequencing Plan.

(1) Projects shall be sequenced and scheduled to maximize the achievement of the goals and purposes of the Plan at the earliest possible time and in the most cost-effective way, consistent with the requirement that each project be justified on a next-added increment basis, including the achievement of the interim goals established pursuant to § 385.38 and the interim targets established pursuant § 385.39, consistent with § 385.36 and § 385.37(b), and to the extent practical given funding, engineering, and other constraints. The sequencing and scheduling of projects shall be based on considering factors, including, but not limited to:

(i) Technical dependencies and constraints;

(ii) Benefits to be provided by the project;

(iii) Availability of lands required for the project; and

(iv) Avoiding elimination or transfers of existing legal sources of water until

an alternate source of comparable quantity and quality is available, in accordance with § 385.36.

(2) The Master Implementation Sequencing Plan shall include appropriate discussion of the logic, constraints, and other parameters used in developing the sequencing and scheduling of projects.

(3) In accordance with § 385.18, the Corps of Engineers and the South Florida Water Management District shall provide opportunities for the public to review and comment on the Master Implementation Sequencing Plan.

(b) Whenever necessary to ensure that the goals and purposes of the Plan are achieved, but at least every five years, the Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, review the Master Implementation Sequencing Plan.

(1) The Master Implementation Sequencing Plan may be revised as appropriate, consistent with the goals and purposes of the Plan, and consistent with § 385.36 and § 385.37(b), to incorporate new information including, but not limited to:

(i) Updated schedules from Project Management Plans;

(ii) Information obtained from pilot projects;

(iii) Updated funding information;

(iv) Approved revisions to the Plan;

(v) Congressional or other authorization or direction;

(vi) Information resulting from the adaptive management program, including new information on costs and benefits; or

(vii) Information regarding progress towards achieving the interim goals established pursuant to § 385.38 and the interim targets established pursuant to § 385.39.

(2) Proposed revisions to the Master Implementation Sequencing Plan shall be analyzed by RECOVER for effects on achieving the goals and purposes of the Plan and the interim goals and targets.

(3) The revised Master Implementation Sequencing Plan shall include information about the reasons for the changes to the sequencing and scheduling of individual projects.

(4) In accordance with § 385.18, the Corps of Engineers and the South Florida Water Management District shall provide opportunities for the public to review and comment on revisions to the

Master Implementation Sequencing Plan.

§ 385.31 Adaptive management program.

(a) *General.* The Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, establish an adaptive management program to assess responses of the South Florida ecosystem to implementation of the Plan; to determine whether or not these responses match expectations, including the achievement of the expected performance level of the Plan, the interim goals established pursuant to § 385.38, and the interim targets established pursuant to § 385.39; to determine if the Plan, system or project operations, or the sequence and schedule of projects should be modified to achieve the goals and purposes of the Plan, or to increase net benefits, or to improve cost effectiveness; and to seek continuous improvement of the Plan based upon new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan integrated into the implementation of the Plan. Endorsement of the Plan as a restoration framework is not intended as an artificial constraint on innovation in its implementation.

(b) *Assessment activities.* (1) RECOVER shall develop an assessment program to assess responses of the system to implementation of the Plan. The Corps of Engineers and the South Florida Water Management District shall develop a guidance memorandum in accordance with § 385.5 for approval by the Secretary of the Army, with the concurrence of the Secretary of the Interior and the Governor, that describes the processes to be used to conduct these assessments.

(2) RECOVER shall develop a monitoring program that is designed to measure status and trends towards achieving the goals and purposes of the Plan throughout the South Florida ecosystem.

(3) RECOVER shall conduct monitoring activities and use the information collected and analyzed through the monitoring program as a

basis for conducting assessment tasks, which may include, but are not limited to, the following:

(i) Determining if measured responses are desirable and are achieving the interim goals and the interim targets or the expected performance level of the Plan;

(ii) Evaluating if corrective actions to improve performance or improve cost-effectiveness should be considered; and

(iii) Preparing reports on the monitoring program.

(4) Whenever it is deemed necessary, but at least every five years, RECOVER shall prepare a technical report that presents an assessment of whether the goals and purposes of the Plan are being achieved, including whether the interim goals and interim targets are being achieved or are likely to be achieved. The technical report shall be provided to the Corps of Engineers and the South Florida Water Management District for use in preparing the assessment report. The technical report prepared by RECOVER shall also be made available to the public.

(i) The Corps of Engineers and the South Florida Water Management District shall consult with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies in the development of the assessment report. The Corps of Engineers and the South Florida Water Management District shall also consult with the South Florida Ecosystem Restoration Task Force in developing the assessment report.

(ii) In accordance with § 385.22(b), the draft assessment report shall be externally peer reviewed.

(iii) In accordance with § 385.18, Corps of Engineers and the South Florida Water Management District shall provide opportunities for the public to review and comment on the draft assessment report.

(iv) The Corps of Engineers and the South Florida Water Management District shall transmit the final assessment report to the Secretary of the Army, the Secretary of the Interior, and the Governor.

(v) The Secretary of the Army shall make the final assessment report available to the public.

(c) *Periodic CERP updates.* Not later than June 14, 2004 and whenever necessary to ensure that the goals and purposes of the Plan are achieved, but not any less often than every five years, the Corps of Engineers and the South

Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, conduct an evaluation of the Plan using new or updated modeling that includes the latest scientific, technical, and planning information. As part of the evaluation of the Plan, the Corps of Engineers and the South Florida Water Management District shall determine the total quantity of water that is expected to be generated by implementation of the Plan, including the quantity expected to be generated for the natural system to attain restoration goals as well as the quantity expected to be generated for use in the human environment. The Corps of Engineers and the South Florida Water Management District shall also consult with the South Florida Ecosystem Restoration Task Force in conducting the evaluation of the Plan. As appropriate, the results of the evaluation of the Plan may be used to initiate management actions in accordance with paragraph (d) of this section that are necessary to seek continuous improvement of the Plan based upon new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan integrated into the implementation of the Plan. In addition, and as appropriate, the results of the evaluation of the Plan may be used to consider changes to the interim goals in accordance with § 385.38 and changes to the interim targets in accordance with § 385.39.

(d) *Management actions.* (1) In seeking continuous improvement of the Plan based upon new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan integrated into the implementation of the Plan, the Corps of Engineers and the South Florida Water Management District and other non-Federal sponsors shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole

Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, use the assessment report prepared in accordance with paragraph (b) of this section, information resulting from independent scientific review and external peer review in accordance with § 385.22, or other appropriate information including progress towards achievement of the interim goals established pursuant to § 385.38 and the interim targets established pursuant to § 385.39 to determine if the activities described in paragraph (d)(2) of this section should be undertaken to ensure that the goals and purposes of the Plan are achieved. The Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, consider the following actions:

- (i) Modifying current operations of the Plan;
 - (ii) Modifying the design or operational plan for a project of the Plan not yet implemented;
 - (iii) Modifying the sequence or schedule for implementation of the Plan;
 - (iv) Adding new components to the Plan or deleting components not yet implemented;
 - (v) Removing or modifying a component of the Plan already in place; or
 - (vi) A combination of these.
- (2) Such actions should be implemented through revisions to Operating Manuals in accordance with § 385.28, revisions to the Master Implementation Sequencing Plan in accordance with § 385.30, a Comprehensive Plan Modification Report in accordance with § 385.32, or other appropriate mechanisms.

§ 385.32 Comprehensive Plan Modification Report

Whenever the Corps of Engineers and the South Florida Water Management District, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, determine that changes to the Plan are necessary to ensure that

the goals and purposes of the Plan are achieved or that they are achieved cost-effectively, or to ensure that each project of the Plan is justified on a next-added increment basis, the Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, prepare a Comprehensive Plan Modification Report using a process that is consistent with the provisions of § 385.10, § 385.14, § 385.18, and § 385.19. The Corps of Engineers and the South Florida Water Management District shall also consult with the South Florida Ecosystem Restoration Task Force in preparing the Comprehensive Plan Modification Report.

(a) *General requirements.* The Comprehensive Plan Modification Report shall:

- (1) Be initiated at the discretion of the Corps of Engineers and the South Florida Water Management District in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, after consideration of the assessment report prepared in accordance with § 385.31(b), requests from the Department of the Interior or the State, or other appropriate information;
- (2) Comply with all applicable Federal and State laws, including the National Environmental Policy Act, the Endangered Species Act, the Fish and Wildlife Coordination Act, the National Historic Preservation Act, the Clean Water Act, the Safe Drinking Water Act, the Clean Air Act, the Coastal Zone Management Act, the Marine Mammal Protection Act, and any other applicable law;

(3) Contain information such as: Plan formulation and evaluation, engineering and design, estimated benefits and costs, and environmental effects; and

(4) Include appropriate analyses of alternatives evaluated by RECOVER;

(5) Include updated water budget information for the Plan, including the total quantity of water that is expected to be generated by implementation of the Plan, and the quantity expected to be generated for the natural system to attain restoration goals as well as the

quantity expected to be generated for use in the human environment;

(6) Contain appropriate NEPA documentation to supplement the Programmatic Environmental Impact Statement included in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999; and

(7) Include coordination with the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the Florida Fish and Wildlife Coordination Commission, and other appropriate agencies in the preparation of the Comprehensive Plan Modification Report, as required by applicable law.

(b) *Review and approval of Comprehensive Plan Modification Report.* (1) The Corps of Engineers and the South Florida Water Management District shall provide opportunities for the public to review and comment on the draft Comprehensive Plan Modification Report and NEPA document, in accordance with § 385.18 and applicable law and Corps of Engineers policy.

(2) The Comprehensive Plan Modification Report shall contain an appropriate letter of intent from the South Florida Water Management District indicating concurrence with the recommendations of the Comprehensive Plan Modification Report.

(3) Upon the completion of the Comprehensive Plan Modification Report and NEPA document, the District Engineer shall submit the report and NEPA document to the Division Engineer.

(4) Upon receipt and approval of the Comprehensive Plan Modification Report, the Division Engineer shall issue a public notice announcing completion of the Comprehensive Plan Modification Report based upon:

(i) The Division Engineer's endorsement of the findings and recommendations of the District Engineer; and

(ii) The Division Engineer's assessment that the report has been prepared in accordance with current law and policy. The notice shall indicate that the report has been submitted to Corps of Engineers Headquarters for review.

(5) Headquarters, U.S. Army Corps of Engineers shall conduct a review in accordance with applicable policies and regulations of the Corps of Engineers. Headquarters, U.S. Army Corps of Engineers shall administer the 30-day state and agency review of the Comprehensive Plan Modification Report, and, as appropriate, file the Environmental Impact Statement with the Environmental Protection Agency.

(6) After completion of the policy review and other requirements of law and policy, the Chief of Engineers shall submit the Comprehensive Plan Modification Report and the Chief of Engineers' recommendations to the Assistant Secretary of the Army for Civil Works.

(7) The Assistant Secretary of the Army for Civil Works shall review the Comprehensive Plan Modification Report and shall, prior to submitting the Assistant Secretary's recommendations to Congress, coordinate the proposed recommendations with the Office of Management and Budget.

(c) *Minor changes to the Plan.* The Plan requires a process for adaptive management and incorporation of new information. As a result of this process, minor adjustments in the Plan may be made through Project Implementation Reports. It is not the intent of this section to require a continual cycle of report writing for minor changes. Instead, the intent of this section is to develop a Comprehensive Plan Modification Report for changes to the Plan that would require a supplement to the programmatic Environmental Impact Statement. The Corps of Engineers and the South Florida Water Management District may, in their discretion, elect to prepare a Comprehensive Plan Modification Report for other changes.

§ 385.33 Revisions to models and analytical tools.

(a) In carrying out their responsibilities for implementing the Plan, the Corps of Engineers, the South Florida Water Management District, and other non-Federal sponsors shall rely on the best available science including models and other analytical tools for conducting analyses for the planning, design, construction, operation, and assessment of projects. The selection of models and analytical tools shall be done in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies.

(b) The Corps of Engineers, the South Florida Water Management District, and other non-Federal sponsors may, in consultation with the Department of the Interior, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Environmental Protection Agency, the Department of Commerce, the Florida Department of Environmental Protection, and other Federal, State, and local agencies,

periodically revise models and analytical tools or develop new models and analytical tools as needed. As appropriate, RECOVER shall review the adequacy of system-wide simulation models and analytical tools used in the evaluation and assessment of projects, and shall propose improvements in system-wide models and analytical tools required for the evaluation and assessment tasks.

(c) The Corps of Engineers and the South Florida Water Management District shall determine on a case-by-case basis what documentation is appropriate for revisions to models and analytic tools, depending on the significance of the changes and their impacts to the Plan. Such changes may be treated as Minor Changes to the Plan, in accordance with § 385.32(c) where appropriate.

§ 385.34 Changes to the Plan.

(a) The Plan shall be updated to incorporate approved changes to the Plan resulting from:

(1) Approval by the Secretary of the Army of a project to be implemented pursuant to § 385.13;

(2) Authorization of projects by Congress;

(3) Comprehensive Plan Modification Reports approved by Congress; or

(4) Other changes authorized by Congress.

(b) The Corps of Engineers and the South Florida Water Management District shall annually prepare a document for dissemination to the public that describes:

(1) The components of the Plan, including any approved changes to the Plan;

(2) The estimated cost of the Plan, including any approved changes to the Plan;

(3) A water budget for the Plan; and

(4) The water that has been reserved or allocated for the natural system under State law for the Plan.

(c) The Corps of Engineers shall annually provide to the Office of Management and Budget an updated estimate of total cost of the Plan, the costs of individual project components, and an explanation of any changes in these estimates from the initial estimates contained in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999.

Subpart E—Ensuring Protection of the Natural System and Water Availability Consistent With the Goals and Purpose of the Plan

§ 385.35 Achievement of the benefits of the Plan.

(a) *Pre-CERP baseline water availability and quality.* (1) Not later than June 14, 2004 the Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Environmental Protection Agency, the Department of Commerce, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop for approval by the Secretary of the Army, the pre-CERP baseline to be used to aid the Corps of Engineers and the South Florida Water Management District in determining if existing legal sources of water will be eliminated or transferred as a result of project implementation as described in § 385.36 and memorialize the pre-CERP baseline in an appropriate document. The Corps of Engineers and the South Florida Water Management District shall consult with the South Florida Ecosystem Restoration Task Force in the development of the pre-CERP baseline.

(i) The pre-CERP baseline may express the quantity, timing, and distribution of water in stage duration curves; exceedance frequency curves; quantities available in average, wet, and dry years; or any other method which is based on the best available science.

(ii) The pre-CERP baseline shall include appropriate documentation that includes a description of the assumptions used to develop the pre-CERP baseline.

(iii) In addition to the development of the pre-CERP baseline, the Corps of Engineers and the South Florida Water Management District shall conduct other analyses that they deem necessary to determine if an existing legal source of water has been eliminated or transferred or if a new source of water is of comparable quality to that which has been eliminated or transferred in accordance with § 385.36.

(2) In accordance with § 385.18, the Corps of Engineers and the South Florida Water Management District shall provide opportunities for the public to review and comment on the pre-CERP baseline.

(3) The pre-CERP baseline shall be developed with the concurrence of the Secretary of the Interior and the Governor. Within 180 days of being provided the pre-CERP baseline, or such

shorter period that the Secretary of the Interior and the Governor may agree to, the Secretary of the Interior and the Governor shall provide the Secretary of the Army with a written statement of concurrence or non-concurrence with the pre-CERP baseline. A failure to provide a written statement of concurrence or non-concurrence within such time frame shall be deemed as meeting the concurrency process of this section. A copy of any concurrency or non-concurrence statements shall be made a part of the administrative record and referenced in the final determination of the pre-CERP baseline. Any non-concurrence statement shall specifically detail the reason or reasons for the non-concurrence.

(4) Nothing in this paragraph is intended to, or shall it be interpreted to, reserve or allocate water or to prescribe the process for reserving or allocating water or for water management under Florida law. Nothing in this section is intended to, nor shall it be interpreted to, prescribe any process of Florida law.

(b) *Identification of water made available and water to be reserved or allocated for the natural system.* (1) Initial modeling showed that most of the water generated by the Plan would go to the natural system in order to attain restoration goals, and the remainder of the water would go for use in the human environment. The Corps of Engineers, the South Florida Water Management District, and other non-Federal sponsors shall ensure that Project Implementation Reports identify the appropriate quantity, timing, and distribution of water to be dedicated and managed for the natural system that is necessary to meet the restoration goals of the Plan. In accordance with the "Comprehensive Everglades Restoration Plan Assurance of Project Benefits Agreement," dated January 9, 2002 pursuant to section 601(h)(2) of WRDA 2000, the South Florida Water Management District or the Florida Department of Environmental Protection shall make sufficient reservations of water for the natural system under State law in accordance with the Project Implementation Report for that project and consistent with the Plan before water made available by a project is permitted for a consumptive use or otherwise made unavailable. In accordance with § 385.31(c), the Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of

Environmental Protection, and other Federal, State, and local agencies, determine the total quantity of water that is expected to be generated by implementation of the Plan, including the quantity expected to be generated for the natural system to attain restoration goals as well as the quantity expected to be generated for use in the human environment, and shall periodically update that estimate, as appropriate, based on new information resulting from changed or unforeseen circumstances, new scientific or technical information, new or updated models, or information developed through the adaptive assessment principles contained in the Plan, or future authorized changes to the Plan integrated into the implementation of the Plan.

(2) Each Project Implementation Report shall take into account the availability of pre-CERP baseline water and previously reserved water as well as the estimated total quantity of water that is necessary for restoration for the natural system and the quantity of water anticipated to be made available from future projects in identifying the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system, determining whether improvements in water quality are necessary to ensure that water delivered to the natural system meets applicable water quality standards; and identifying the amount of water for the natural system necessary to implement, under State law, the provisions of section 601(h)(4)(A)(iii)(V) of WRDA 2000.

(3) Section 601(h)(3)(C)(i)(I) of WRDA 2000 requires the regulations of this part to establish a process for development of Project Implementation Reports, Project Cooperation Agreements, and Operating Manuals that ensure that the goals and objectives of the Plan are achieved. Section 601(h)(4)(A)(iii)(IV) of WRDA 2000 provides that Project Implementation Reports shall identify the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system. Section 601(h)(4)(A)(iii)(V) of WRDA 2000 provides that Project Implementation Reports shall identify the amount of water to be reserved or allocated for the natural system necessary to implement, under State law, the provisions of section 601(h)(4)(A)(iii)(IV) and (VI) of WRDA 2000. To implement these provisions and § 385.5, the Corps of Engineers and the South Florida Water Management District shall develop a guidance memorandum in accordance with § 385.5 for approval by the Secretary of the Army, with the

concurrence of the Secretary of the Interior and the Governor. The guidance memorandum shall provide a process to be used in the preparation of Project Implementation Reports for identifying the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system; determining the quantity, timing and distribution of water made available for other water-related needs of the region; determining whether improvements in water quality are necessary to ensure that water delivered by the Plan meets applicable water quality standards; and identifying the amount of water for the natural system necessary to implement, under State law, the provisions of section 601(h)(4)(A)(iii) of WRDA 2000.

(i) The guidance memorandum shall generally be based on using a system-wide analysis of the water made available and may express the quantity, timing and distribution of water in stage duration curves; exceedance frequency curves; quantities available in average, wet, and dry years; or any other method which is based on the best available science. The guidance memorandum shall also provide for projects that are hydrologically separate from the rest of the system. The guidance memorandum also shall address procedures for determining whether improvements in water quality are necessary to ensure that water delivered to the natural system meets applicable water quality standards. These procedures shall ensure that any features to improve water quality are implemented in a manner consistent with the cost sharing provisions of WRDA 1996 and WRDA 2000.

(ii) The guidance memorandum shall generally take into account the natural fluctuation of water made available in any given year based on an appropriate period of record; the objective of restoration of the natural system; the need for protection of existing uses transferred to new sources; contingencies for drought protection; the need to identify the additional quantity, timing, and distribution of water made available by a new project component while maintaining a system-wide perspective on the amount of water made available by the Plan; and the need to determine whether improvements in water quality are necessary to ensure that water delivered by the Plan meets applicable water quality standards.

(iii) Project Implementation Reports approved before December 12, 2003 or before the development of the guidance memorandum may use whatever method that the Corps of Engineers and the non-Federal sponsor deem is

reasonable and consistent with the provisions of section 601 of WRDA 2000.

(iv) Nothing in this paragraph is intended to, or shall it be interpreted to, reserve or allocate water or to prescribe the process for reserving or allocating water or for water management under Florida law. Nothing in this section is intended to, nor shall it be interpreted to, prescribe any process of Florida law.

(c) *Procedures in event that the project does not perform as expected.* The Project Implementation Report shall include a plan for operations of the project in the event that the project fails to provide the quantity, timing, or distribution of water described in the Project Implementation Report. Such plan shall take into account the specific authorized purposes of the project and the goals and purposes of the Plan and shall also provide for undertaking management actions in accordance with § 385.31(d).

§ 385.36 Elimination or transfer of existing legal sources of water.

(a) Pursuant to the provisions of section 601(h)(5)(A) of WRDA 2000, Project Implementation Reports shall include analyses to determine if existing legal sources of water are to be eliminated or transferred as a result of project implementation. If implementation of the project shall cause an elimination or transfer of existing legal sources of water, then the Project Implementation Report shall include an implementation plan that ensures that such elimination or transfer shall not occur until a new source of water of comparable quantity and quality is available to replace the water to be lost as a result of implementation of the Plan. The Corps of Engineers and the non-Federal sponsor shall determine if implementation of the project will cause an elimination or transfer of existing legal sources of water by comparing the availability of water with the recommended project with the pre-CERP baseline developed in accordance with § 385.35(a), by using the water quality and other analyses developed in § 385.35(a)(1)(iii), and by using other appropriate information.

(b) The Corps of Engineers and the South Florida Water Management District shall develop a guidance memorandum in accordance with § 385.5 for approval by the Secretary of the Army, with the concurrence of the Secretary of the Interior and the Governor, that describes the process for determining if existing legal sources of water are to be eliminated or transferred and for determining how and when a new source of water of comparable

quantity and quality as that available on the date of enactment of WRDA 2000 is available to replace the water to be lost as a result of implementation of the Plan. The guidance memorandum shall also describe the process for comparing the recommended project with the pre-CERP baseline to determine if existing legal sources of water are to be transferred or eliminated as a result of project implementation. The guidance memorandum shall include a definition for existing legal sources of water for the purposes of determining if existing legal sources of water are to be eliminated or transferred. Existing legal sources of water shall include those for:

- (1) An agricultural or urban water supply;
 - (2) Allocation or entitlement to the Seminole Indian Tribe of Florida under section 7 of the Seminole Indian Land Claims Settlement Act of 1987 (25 U.S.C. 1772e);
 - (3) The Miccosukee Tribe of Indians of Florida;
 - (4) Water supply for Everglades National Park; and
 - (5) Water supply for fish and wildlife.
- (c) Until guidance is issued, issues involving existing legal sources of water should be resolved on a case-by-case basis considering all factors that can be identified as relevant to decisions under the savings clause.

§ 385.37 Flood protection.

(a) *General.* In accordance with section 601 of WRDA 2000, flood protection, consistent with restoration, preservation, and protection of the natural system, is a purpose of the Plan.

(b) *Existing flood protection.* Each Project Implementation Report shall include appropriate analyses, and consider the operational conditions included in the pre-CERP baseline developed pursuant to § 385.35(a), to demonstrate that the levels of service for flood protection that:

- (1) Were in existence on the date of enactment of section 601 of WRDA 2000; and
- (2) Are in accordance with applicable law, will not be reduced by implementation of the project.

(c) *Improved and new flood protection.* The overarching objective of the Plan is the restoration, preservation, and protection of the South Florida Ecosystem while providing for other water-related needs of the region, including water supply and flood protection. As appropriate, the Corps of Engineers and the non-Federal sponsor shall consider opportunities to provide additional flood protection, consistent with restoration of the natural system, and the provisions of section

601(f)(2)(B) of WRDA 2000 and other applicable laws.

§ 385.38 Interim goals.

(a) *Agreement.* (1) The Secretary of the Army, the Secretary of the Interior, and the Governor shall, not later than December 13, 2004, and in consultation with the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, and other Federal, State, and local agencies, and the South Florida Ecosystem Restoration Task Force, execute an Interim Goals Agreement establishing interim goals to facilitate inter-agency planning, monitoring, and assessment so as to achieve the overarching objectives of the Plan and to provide a means by which the restoration success of the Plan may be evaluated, and ultimately reported to Congress in accordance with § 385.40 throughout the implementation process.

(2) After execution of the Interim Goals Agreement, the Department of the Army shall memorialize the agreement in appropriate Corps of Engineers guidance.

(b) *Purpose.* (1) Interim goals are a means by which the restoration success of the Plan may be evaluated at specific points by agency managers, the State, and Congress throughout the overall planning and implementation process. In addition, interim goals will facilitate adaptive management and allow the Corps of Engineers and its non-Federal sponsors opportunities to make adjustments if actual project performance is less than anticipated, including recommending changes to the Plan. Interim goals are not standards or schedules enforceable in court.

(2) The interim goals shall:

(i) Facilitate inter-agency planning, monitoring and assessment;

(ii) Be provided to the independent scientific review panel established in accordance with § 385.22(a);

(iii) Be considered in developing the Master Implementation Sequencing Plan, Project Implementation Reports, and Comprehensive Plan Modification Reports; and

(iv) Be considered in making budgetary decisions concerning implementation of the Plan.

(3) To ensure flexibility in implementing the Plan over the next several decades, and to ensure that interim goals may reflect changed circumstances or new information resulting from adaptive management, the interim goals may be modified, consistent with the processes set forth in paragraph (d) of this section, to reflect new information resulting from

changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan integrated into the implementation of the Plan.

(4) The Corps of Engineers and the South Florida Water Management District shall sequence and schedule projects as appropriate to achieve the interim goals and the interim targets established pursuant to § 385.39 to the extent practical given funding, technical, or other constraints.

(5) If the interim goals have not been met or are unlikely to be met, then the Corps of Engineers and the South Florida Water Management District shall determine why the interim goals have not been met or are unlikely to be met and either:

(i) Initiate adaptive management actions pursuant to § 385.31(d) to achieve the interim goals as soon as practical, consistent with the purposes of the Plan and consistent with the interim targets established pursuant to § 385.39; or

(ii) Recommend changes to the interim goals in accordance with paragraph (b)(3) of this section.

(c) *Principles for developing interim goals.* (1) RECOVER, using best available science and information, shall recommend a set of interim goals for implementation of the Plan, consisting of regional hydrologic performance targets, improvements in water quality, and anticipated ecological responses for areas such as, Lake Okeechobee, the Kissimmee River Region, the Water Conservation Areas, the Lower East Coast, the Upper East Coast, the Everglades Agricultural Area, and the Caloosahatchee River, Everglades National Park, Big Cypress National Preserve, Biscayne Bay, Florida Bay, and other estuaries and nearshore areas. These interim goals shall reflect the incremental accomplishment of the expected performance level of the Plan, and will identify improvements in quantity, quality, timing, and distribution of water for the natural system provided by the Plan in five-year increments that begin in 2005, with the goals reflecting the results expected to be achieved by 2010 and for each five-year increment thereafter. The interim goals shall be developed through the use of appropriate models and tools and shall provide a quantitative basis for evaluating the restoration success of the Plan during the period of implementation. In developing the interim goals for the five-year increments, RECOVER shall use the

Master Implementation Sequencing Plan as the basis for predicting performance at a given time. RECOVER may recommend additional interim goals in addition to those initially developed and may propose revisions to the initial set of interim goals as new information is gained through adaptive management. Interim goals shall include incremental improvements in the quantity, quality, timing, and distribution of water anticipated to be required to meet long-term hydrological and ecological restoration goals, based on best available science. These goals may be modified, based on best available science and the adaptive assessment principles contained in the Plan, in accordance with paragraph (d) of this section.

(2) In developing its recommendations for interim goals, RECOVER shall consider indicators including, but not limited to:

(i) Hydrologic indicators, including:

(A) The amount of water, in addition to the pre-CERP baseline and assumptions regarding without project conditions, which will be available to the natural system;

(B) Hydroperiod targets in designated sample areas throughout the Everglades;

(C) The changes in the seasonal and annual overland flow volumes in the Everglades that will be available to the natural system;

(D) The frequency of extreme high and low water levels in Lake Okeechobee; and

(E) The frequency of meeting salinity envelopes in estuaries such as the St. Lucie, Caloosahatchee, Biscayne Bay, and Florida Bay and nearshore areas.

(ii) Improvement in water quality; including:

(A) Total phosphorus concentrations in the Everglades; and

(B) Lake Okeechobee phosphorus concentrations.

(iii) Ecological responses, including:

(A) Increases in total spatial extent of restored wetlands;

(B) Improvement in habitat quality; and

(C) Improvement in native plant and animal abundance.

(3) In developing the interim goals based upon water quality and expected ecological responses, the Corps of Engineers, The Department of the Interior, and the South Florida Water Management District shall take into consideration the extent to which actions undertaken by Federal, State, tribal, and other entities under programs not within the scope of this part may affect achievement of the goals.

(d) *Process for establishing interim goals.* (1) The recommendations of RECOVER shall be provided to the

Corps of Engineers, the Department of the Interior, and the South Florida Water Management District. These recommendations shall be provided no later than June 14, 2004. The proposed Interim Goals Agreement shall be developed by the Secretary of the Army, the Secretary of the Interior and the Governor in consultation with the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Environmental Protection Agency, the Department of the Commerce, other Federal, State, and local agencies, and the South Florida Ecosystem Restoration Task Force. In considering the interim goals to be included in the Interim Goals Agreement, the Secretary of the Army, the Secretary of the Interior, and the Governor, shall be provided with, and consider, the technical recommendations of RECOVER and any modifications to those recommendations by the Corps of Engineers, the Department of Interior, or the South Florida Water Management District. The Secretary of the Army shall provide a notice of availability of the proposed agreement to the public in the **Federal Register** and seek public comments. After considering comments of the public on the proposed agreement, and incorporating any suggestions that are appropriate and consistent with the goals and purposes of the Plan, the Secretary of the Army, the Secretary of the Interior, and the Governor, shall execute the final agreement, and the Secretary of the Army shall provide a notice of availability to the public in the **Federal Register** by no later than December 13 2004.

(2) In developing its recommendations for interim goals, RECOVER shall use the principles in paragraph (c) of this section.

(3) The Secretary of the Army, the Secretary of the Interior, and the Governor shall review the Interim Goals Agreement at a minimum of every five years after the date of the Interim Goals Agreement, to determine if the interim goals should be revised. Thereafter, the Secretary of the Army, the Secretary of the Interior, and the Governor shall revise the interim goals and execute a new agreement as appropriate. However, the Secretary of the Army, the Secretary of the Interior, and the Governor may review and revise the interim goals whenever appropriate as new information becomes available. Any revisions to the interim goals shall be consistent with the process established in this section.

§ 385.39 Evaluating progress towards other water-related needs of the region provided for in the Plan.

(a) *Purpose.* (1) The overarching objective of the Plan is the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection. Progress towards providing for these other water-related needs shall also be evaluated.

(2) As provided for in paragraph (c) of this section, the Secretary of the Army and the Governor shall establish interim targets for evaluating progress towards other water-related needs of the region provided for in the Plan throughout the implementation process. The interim targets and interim goals shall be consistent with each other.

(3) The Department of the Army shall include these interim targets in appropriate Corps of Engineers guidance.

(4) To ensure flexibility in implementing the Plan over the next several decades, and to ensure that interim targets may reflect changed circumstances or new information resulting from adaptive management, the interim targets may be modified, consistent with the processes set forth in paragraph (c) of this section, to reflect new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan integrated into the implementation of the Plan.

(5) The Corps of Engineers and the South Florida Water Management District shall sequence and schedule projects as appropriate to achieve the interim goals and interim targets for other water-related needs of the region provided for in the Plan, to the extent practical given funding, technical, or other constraints.

(6) If the interim targets have not been met or are unlikely to be met, then the Corps of Engineers and the South Florida Water Management District shall determine why the interim targets have not been met or are unlikely to be met and either:

(i) Initiate adaptive management actions pursuant to § 385.31(d) to achieve the interim targets as soon as practicable, consistent with the purposes of the Plan and consistent with the interim goals established pursuant to § 385.38; or

(ii) Recommend changes to the interim targets in accordance with paragraph (a)(4) of this section.

(b) *Principles for developing interim targets.* (1) RECOVER, using best available science and information, shall recommend a set of interim targets for evaluating progress towards other water-related needs of the region provided for in the Plan. These interim targets shall reflect the incremental accomplishment of the expected performance level of the Plan, and will identify improvements in quantity, quality, timing and distribution of water in five-year increments that begin in 2005, with the targets reflecting the results expected to be achieved by 2010 and for each five-year increment thereafter. The interim targets shall be developed through the use of appropriate models and tools and shall provide a quantitative basis for evaluating progress towards other water-related needs of the region provided for in the Plan during the period of implementation. In developing the interim targets for the five-year increments, RECOVER shall use the Master Implementation Sequencing Plan as the basis for predicting the performance at a given time. RECOVER may recommend additional interim targets for implementation of CERP in addition to those initially developed and may propose revisions to the initial set of interim targets as new information is gained through adaptive management.

(2) In developing its recommendations for interim targets, RECOVER shall consider indicators including, but not limited to:

(i) The frequency of water restrictions in the Lower East Coast Service Areas at each time increment;

(ii) The frequency of water restrictions in the Lake Okeechobee Service Areas at each time increment;

(iii) The frequency of meeting salt-water intrusion protection criteria for the Lower East Coast Service Area at each time increment; and

(iv) The frequency of water shortage restrictions on lands covered under the Water Rights Compact Among the Seminole Tribe of Florida, the State of Florida, and the South Florida Water Management District at each time increment.

(c) *Process for establishing interim targets.* (1) The recommendations of RECOVER shall be provided to the Corps of Engineers and the South Florida Water Management District. These recommendations shall be provided no later than June 14, 2004. The proposed interim targets shall be developed by the Secretary of the Army and the Governor, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida,

the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, and the South Florida Ecosystem Restoration Task Force. In considering the interim targets, the Secretary of the Army and the Governor, shall be provided with, and consider, the technical recommendations of RECOVER and any modifications to those recommendations by the Corps of Engineers or the South Florida Water Management District. The Secretary of the Army shall provide a notice of availability of the proposed interim targets to the public in the **Federal Register** and seek public comments. After considering comments of the public on the proposed interim targets, and incorporating any suggestions that are appropriate and consistent with the goals and purposes of the Plan, the Secretary of the Army and the Governor, shall establish the final interim targets, and the Secretary of the Army shall provide a notice of availability to the public in the **Federal Register** by no later than December 13, 2004, but not prior to the execution of the Interim Goals Agreement pursuant to § 385.38. Interim targets are intended to facilitate inter-agency planning, monitoring, and assessment throughout the implementation process and are not standards or schedules enforceable in court.

(2) In developing its recommendations for interim targets, RECOVER shall use the principles in paragraph (b) of this section.

(3) The Secretary of the Army and the Governor shall review the interim targets at a minimum every five years beginning five years after the establishment of the interim targets to determine if they should be revised and to determine what those revisions should be. The public shall also be provided with an opportunity to comment on the proposed revisions. The Secretary of the Army and the Governor may also revise the interim targets whenever appropriate as new information becomes available. Any revisions to the interim targets shall be established consistent with the process described in this section.

§ 385.40 Reports to Congress.

(a) Beginning on October 1, 2005 and periodically thereafter until October 1, 2036, the Secretary of the Army and the Secretary of the Interior shall jointly submit to Congress a report on the implementation of the Plan as required by section 601(l) of WRDA 2000. Such reports shall be completed not less often than every five years.

(b) This report shall be prepared in consultation with the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, the South Florida Water Management District, and other Federal, State, and local agencies and the South Florida Ecosystem Restoration Task Force.

(c) Such reports shall include a description of planning, design, and construction work completed, the amount of funds expended during the period covered by the report, including a detailed analysis of the funds expended for adaptive management, and the work anticipated over the next five-year period and updated estimates of total cost of the Plan and individual component costs and an explanation of any changes from the initial estimates contained in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999.

(d) In addition, each report shall include:

(1) The determination of each Secretary, and the Administrator of the Environmental Protection Agency, concerning the benefits to the natural system and the human environment achieved as of the date of the report and whether the completed projects of the Plan are being operated in a manner that is consistent with the requirements of section 601(h) of WRDA 2000;

(2) Progress towards the interim goals established in accordance with § 385.38 for assessing progress towards achieving the benefits to the natural system;

(3) Progress towards interim targets for other water-related needs of the region provided for in the Plan established pursuant § 385.39 for

assessing progress towards achieving the benefits to the human environment; and

(4) A review of the activities performed by the Secretary pursuant to section 601(k) of WRDA 2000 and § 385.18 and § 385.19 as they relate to socially and economically disadvantaged individuals and individuals with limited English proficiency.

(e) The discussion on interim goals in the periodic reports shall include:

(1) A discussion of the performance that was projected to be achieved in the last periodic report to Congress;

(2) A discussion of the steps taken to achieve the interim goals since the last periodic Report to Congress and the actual performance of the Plan during this period;

(3) If performance did not meet the interim goals, a discussion of the reasons for such shortfall;

(4) Recommendations for improving performance; and

(5) The interim goals to be achieved in the next five years, including any revisions to the interim goals, reflecting the work to be accomplished during the next five years, along with a discussion of steps to be undertaken to achieve the interim goals.

(f) The discussion on interim targets in the periodic reports shall include:

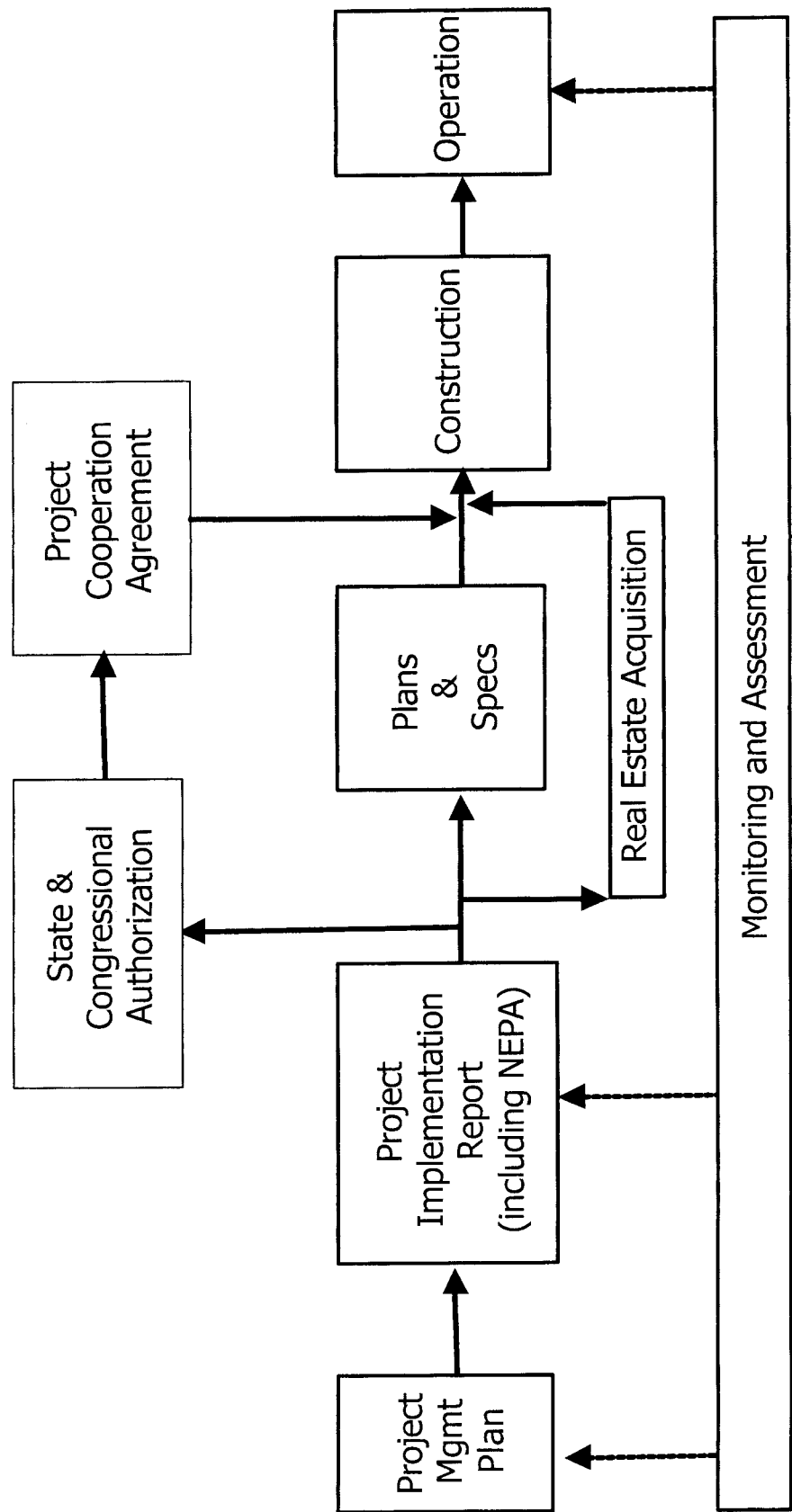
(1) A discussion of the expected and actual performance of the Plan in achieving interim targets since the last periodic Report to Congress, including the reasons for any deviations from expected performance; and

(2) A discussion of the interim targets expected to be achieved during the next five years, including specific activities to achieve them and any recommendations for improving performance.

(g) In preparing the report to Congress required pursuant to this section, the Corps of Engineers and the Department of the Interior shall provide an opportunity for public review and comment, in accordance with § 385.18.

BILLING CODE 3710-92-P

CERP Project Development Process



Appendix A

Figure 1

TYPICAL PROJECT IMPLEMENTATION REPORT (PIR) PROCESS

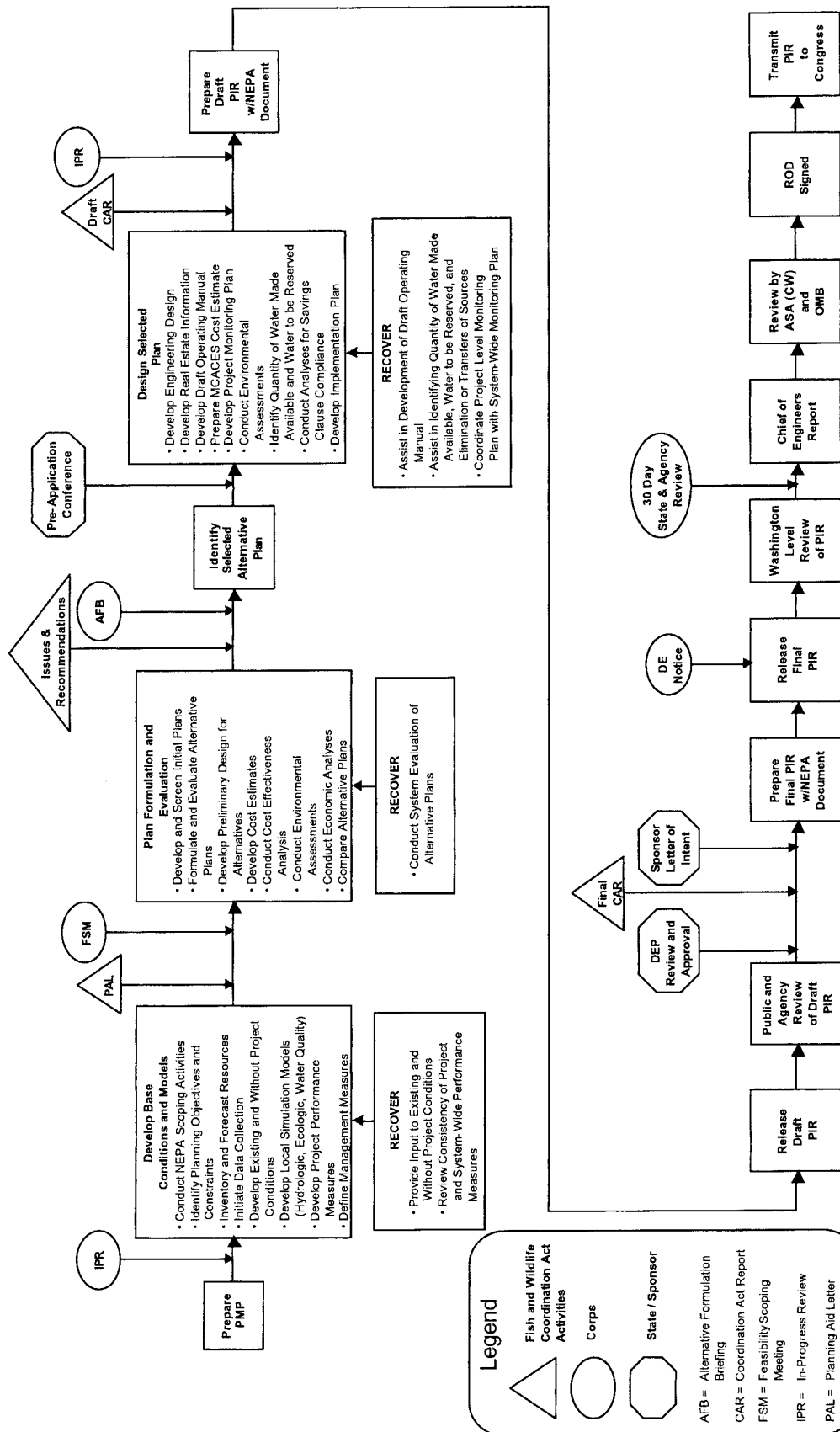


Figure 2

Appendix A

[The following concurrency statements are an appendix to this **Federal Register** document and will not appear in the Code of Federal Regulations.]



THE SECRETARY OF THE INTERIOR
WASHINGTON

OCT 28 2003

The Honorable Les Brownlee
Acting Secretary of the Army
Office of the Under Secretary of the Army
102 Army Pentagon, Rm. 3E732
Washington, DC 20310-0102

Dear Secretary Brownlee:

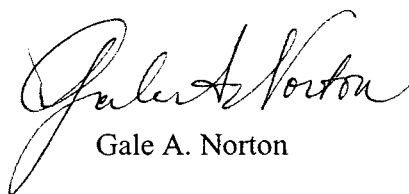
The Department of the Interior appreciates the tremendous effort of the Jacksonville District of the Army Corps of Engineers to develop the programmatic regulations to implement the Comprehensive Everglades Restoration Plan (Plan). We appreciate the extra opportunities afforded to the public, and all stakeholders, to participate in the development of the regulations.

Issuance of the final programmatic regulations is an important and significant step toward a restored Everglades. Along with the Assurances of Project Benefits Agreement, which was signed by the President and the Governor of Florida in January 2002, the programmatic regulations prescribe processes to ensure that the Everglades natural system environment will once again receive the appropriate quantity, timing and distribution of water. Restoration is clearly defined and procedures are set forth to adaptively manage the implementation of the Plan so that it may be adjusted as new information is developed.

We are pleased that the programmatic regulations recognize the role of Interior and its agencies in the Plan's implementation. We look forward to working with the Army on the guidance memoranda, the pre-CERP baseline, and the joint development of interim goals. As steward of one-half the remaining Everglades, we pledge to work closely with our Federal and State partners to ensure that the goals and purposes of the Plan are achieved.

The Department believes that the final programmatic regulations fully meet the legal requirements of Section 601(h)(3)(C) of the Water Resources Development Act of 2000. As a result, I concur with your issuance of the final programmatic regulations.

Sincerely,



Gale A. Norton



JEB BUSH
GOVERNOR

STATE OF FLORIDA

Office of the Governor

THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001

www.flgov.com
850-488-7146
850-487-0801 fax

October 30, 2003

The Honorable Les Brownlee
Acting Secretary of the Army
101 Army Pentagon
Washington, DC 20310-0108

Dear Mr. Brownlee:

The State of Florida concurs with the Programmatic Regulations established by the United States Army Corps of Engineers to guide the 30-year Comprehensive Everglades Restoration Plan. This concurrence letter is submitted in accordance with Section 601(h)(3) of the Water Resources Development Act of 2000 ("Act").

The framework established by these regulations embodies the letter and spirit of the law that launched Everglades restoration – a 50-50 partnership between Florida and the federal government to restore a more natural flow of water to the famed River of Grass.

Since passage of the Act, Florida has committed more than \$2.5 billion to clean up pollution and replenish the watery landscape of the Everglades. More than 80 percent of the land for initial restoration projects and half the total land needed to complete restoration have been acquired. Within the last month, Florida began operating a wetland treatment system to clean water before it enters the pristine marsh, donated the last of more than 42,000 acres to complete the expansion of Everglades National park, and started work on the first restoration construction project, ahead of schedule and under budget.

The Programmatic Regulations strengthen the fair and equitable partnership to save the habitat of more than 60 endangered species and replenish the underground supply of water for millions of Floridians.

Sincerely,

A handwritten signature in black ink that reads "Jeb Bush".

Jeb Bush

JB/pan

cc: Mr. John Paul Woodley



Governor's Mentoring Initiative
BE A MENTOR. BE A BIG HELP.
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Federal Register

**Wednesday,
November 12, 2003**

Part III

Environmental Protection Agency

**Office of Environmental Education
Solicitation Notice Environmental
Education Grants Program (CFDA 66.951)
Fiscal Year 2004; Notice**

ENVIRONMENTAL PROTECTION AGENCY

[FRL-7585-7]

Office of Environmental Education: Solicitation Notice, Environmental Education Grants Program (CFDA 66.951), Fiscal Year 2004

Contents

Section I—Overview and Deadlines
Section II—Eligible Applicants and Activities
Section III—Funding Priorities
Section IV—Requirements for Proposals and Matching Funds
Section V—Review and Selection Process
Section VI—Grantee Responsibilities
Section VII—Resource Information and Mailing List
Appendices—Federal Forms and Instructions

Section I. Overview and Deadlines

A. Overview

Subject to Congressional action to appropriate funds for EPA's Environmental Education Grant Program, this document solicits grant proposals from education institutions, environmental and educational public agencies, and not-for-profit 501 (c)(3) organizations to support environmental education projects. This grants program provides financial support for projects which design, demonstrate, or disseminate environmental education practices, methods, or techniques. This program is authorized under section 6 of the National Environmental Education Act of 1990 (the Act) (Pub. L. 101-619).

Please Note: In recent years, EPA has traditionally received funding of approximately \$3 million annually for this grant program. At the time of issuance of this Solicitation Notice, future funding for the program is uncertain because the federal budget for 2004 is not yet final. However, EPA decided not to miss the annual grant cycle by failing to issue a Solicitation Notice. Since EPA cannot currently anticipate what the appropriation from Congress, if any, will be, we are advising potential grant applicants to refer to our Web site closer to the application deadline to determine the status of funding for the program (www.epa.gov/enviroed). EPA reserves the right to reject all proposals and make no awards.

This solicitation notice contains all the information and forms necessary to prepare a proposal. If your project is selected as a finalist after the evaluation process is concluded, EPA will provide you with additional Federal forms needed to process your proposal. These grants require non-federal matching funds for at least 25% of the total cost of the project.

B. Environmental Education versus Environmental Information

Environmental Education: Increases public awareness and knowledge about environmental issues and provides the skills to make informed decisions and take responsible actions. It is based on objective and scientifically sound information. It does not advocate a particular viewpoint or course of action. It teaches individuals how to weigh various sides of an issue through critical thinking and it enhances their own problem-solving and decision making skills.

Environmental Information: Proposals that simply disseminate "information" will not be funded. These would be projects that provide facts or opinions about environmental issues or problems, but may not enhance critical-thinking, problem solving or decision-making skills. Although information is an essential element of any educational effort, environmental information is not, by itself, environmental education.

C. Due Date and Grant Schedule

(1) **Due Date**—January 6, 2004 is the *postmark* due date for an original proposal signed by an authorized representative plus two copies to be mailed to EPA. Proposals mailed or sent after this date will not be considered for funding.

(2) **Rejection Letters**—EPA Headquarters and the 10 Regional Offices mail these letters at different times as determined by scheduling to accommodate review teams. Letters are usually sent within 6 months after submission of proposals.

(3) **Start Date and Length of Projects**—July 1, 2004 is the earliest start date that applicants should plan on and enter on their application forms and timelines. Budget periods cannot exceed *one-year* for small grants of \$10,000 or less. EPA prefers a one-year budget period for larger grants, but will accept a budget period of up to two-years, if the project timeline clarifies that more than a year is necessary for full implementation of the project.

D. Addresses for Mailing Proposals

Proposals requesting over \$25,000 in Federal environmental education grant funds must be mailed to EPA Headquarters in Washington, DC; proposals requesting \$25,000 or less from EPA must be mailed to the EPA Regional Office where the project takes place. The Headquarters address and the list of Regional Office mailing addresses by state is included at the end of this notice. Note that in some locations EPA addresses differ for postal versus courier service.

E. Dollar Limits Per Proposal

Each year, this program generates a great deal of public enthusiasm for developing environmental education projects. Consequently, EPA receives many more applications for these grants than can be supported with available funds. The competition for grants is intense, especially at Headquarters which usually receives over 250 proposals and is usually able to fund 10 to 15 grants or about 5% of the applicants. The EPA Regional Offices receive fewer applications and on average fund over 30% each year.

Grants in excess of \$100,000 are seldom awarded through this program. Although the Act sets a maximum limit of \$250,000 in environmental education grant funds for any one project, because of limited funds, EPA prefers to award smaller grants to more recipients. In summary, you will significantly increase your chance of being funded if your budget is competitive and you request \$5,000 or less from a Regional Office or \$100,000 or less from Headquarters.

Section II. Eligible Applicants and Activities

E. Eligible Applicants

Any local education agency, state education or environmental agency, college or university, not-for-profit organization as described in section 501(C)(3) of the Internal Revenue Code, or noncommercial educational broadcasting entity may submit a proposal. Applicant organizations must be located in the United States and the majority of the educational activities must take place in the United States, Canada and/or Mexico.

"Tribal education agencies" which may also apply include a school or community college which is controlled by an Indian tribe, band, or nation, which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians and which is not administered by the Bureau of Indian Affairs. Tribal organizations do not qualify unless they meet this criteria or the not-for-profit criteria listed above. The terms for eligibility are defined in section 3 of the Act and 40 CFR 47.105.

A teacher's school district, an educator's nonprofit organization, or a faculty member's college or university may apply, but an individual teacher, educator, or faculty member *may not*.

F. Multiple or Repeat Proposals

An organization may submit more than one proposal if the proposals are for different projects. No organization

will be awarded more than one grant for the same project during the same fiscal year. Applicants who received one of these grants in the past may submit a new proposal to expand a previously funded project or to fund an entirely different one. Each new proposal will be evaluated based upon the specific criteria set forth in this solicitation and in relation to the other proposals received in this fiscal year. Due to limited resources, EPA does not generally sustain projects beyond the initial grant period. This grant program is geared toward providing seed money to initiate new projects or to advance existing projects that are "new" in some way, such as reaching new audiences or new locations. If you have received a grant from this program in the past, it is essential that you explain how your current proposal is new.

G. Restrictions on Curriculum Development

EPA strongly encourages applicants to use and disseminate *existing* environmental education materials (curricula, training materials, activity books, etc.) rather than designing new materials, because experts indicate that a significant amount of quality educational materials have already been developed and are under-utilized. EPA will consider funding new materials *only* where the applicant demonstrates that there is a need, *e.g.*, that existing educational materials cannot be adapted well to a particular local environmental concern or audience, or existing materials are not otherwise accessible. The applicant must specify what steps they have taken to determine this need, *e.g.*, you may cite a conference where this need was discussed, the results of inquiries made within your community or with various educational institutions, or a research paper or other published document. Further, EPA recommends the use of a publication entitled *Environmental Education Materials: Guidelines for Excellence* which was developed in part with EPA funding. These guidelines contain recommendations for developing and selecting quality environmental education materials. On our Web site under "Resources" you may view these guidelines and find information about ordering copies.

I. Ineligible Activities

Environmental education funds cannot be used for:

(1) Technical training of environmental management professionals;

(2) Environmental "information" projects that have no educational

component, as described in Section I (B);

(3) Lobbying or political activities, in accordance with OMB Circulars A-21, A-87 and A-122;

(4) Advocacy promoting a particular point of view or course of action;

(5) Non-educational research and development; or

(6) Construction projects-EPA will not fund construction activities such as the acquisition of real property (*e.g.*, buildings) or the construction or modification of any building. EPA may, however, fund activities such as creating a nature trail or building a bird watching station as long as these items are an integral part of the environmental education project, and the cost is a relatively small percentage of the total amount of federal funds requested.

Section III. Funding Priorities

J. Educational Priorities

All proposals must satisfy the definition of "environmental education" specified above in Paragraph (B) and also address one of the following educational priorities. The order of the list is random and does not indicate a ranking. Please read the definitions that are included in this section to prevent your application from being rejected for failure to correctly address a priority.

(1) *Capacity Building*: Increasing capacity to develop and deliver coordinated environmental education programs across a state or across multiple states.

(2) *Education Reform*: Utilizing environmental education as a catalyst to advance state, local, or tribal education reform goals.

(3) *Community Issues*: Designing and implementing model projects to educate the public about environmental issues and/or health issues in their communities through community-based organizations or through print, film, broadcast, or other media.

(4) *Health*: Educating teachers, students, parents, community leaders, or the public about human-health threats from environmental pollution, especially as it affects children, and how to minimize human exposure to preserve good health.

(5) *Teaching Skills*: Educating teachers, faculty, or nonformal educators about environmental issues to improve their environmental education teaching skills, *e.g.*, through workshops.

(6) *Career Development*: Educating students in formal or nonformal settings about environmental issues to encourage environmental careers.

(7) *Environmental Justice*: Educating low-income or culturally-diverse

audiences about environmental issues, thereby advancing environmental justice.

Definitions: The terms used above and in Section IV are defined as follows:

Capacity Building is a significant EPA goal, however, many proposals have been rejected for failure to satisfy the scope of this definition. Read this whole paragraph carefully and please note that it requires networking with various types of educational organizations and statewide implementation of educational programs. If your project fails to meet these objectives, please select another educational priority. For purposes of this program "Capacity Building" refers to developing effective leaders and organizations that design, implement, and link environmental education programs across a state or states to promote long-term sustainability of the programs.

Coordination should involve all major education and environmental education providers including state education and natural resource agencies, schools and school districts, professional education associations, and nonprofit educational and tribal organizations. Effective efforts leverage available resources and decrease fragmentation of effort and duplication across programs. Examples of activities include: identifying and assessing needs and setting priorities; identifying, evaluating and linking programs; developing and implementing strategic plans; identifying funding sources and resources; facilitating communication and networking; promoting sustained professional development; and sponsoring leadership seminars. If existing capacity building efforts are underway in your state please explain how you will support those efforts with your proposal. For an excellent example of a successful project please see www.epa.gov/enviroed and read the grant profile for the 1999 Ohio Environmental Education Council.

Education Reform refers to state, local, or tribal efforts to improve student academic achievement. Where feasible, collaboration with private sector providers of technology and equipment is recommended. Education reform efforts often focus on changes in curriculum, instruction, assessment or how schools are organized. Curriculum and instructional changes may include inquiry and problem solving, real-world learning experiences, project-based learning, team building and group decision-making, and interdisciplinary study. Assessment changes may include developing content and performance standards and realigning curriculum and instruction to the new standards

and new assessments. School site changes may include creating magnet schools or encouraging parental and community involvement. *Note: All proposals must identify existing educational improvement needs and goals and discuss how the proposed project will address these needs and goals.*

Environmental issue is one of importance to the community, state, or region being targeted by the project, e.g., one community may have significant air pollution problems which makes teaching about human health effects from it and solutions to air pollution important, while rapid development in another community may threaten a nearby wildlife habitat, thus making habitat or ecosystem protection a high priority issue.

Environmental Justice refers to the fair treatment of people of all races, cultures, and income with respect to the development, implementation and enforcement of environmental laws, regulations, and policies. No racial, ethnic, or socioeconomic group should bear a disproportionate share of the negative environmental consequences that might result from the operation of industrial, municipal, and commercial enterprises and from the execution of federal, state, local, and tribal programs and policies.

Partnerships refers to the forming of a collaborative working relationship between two or more organizations such as governmental agencies, not-for-profit organizations, educational institutions, and/or the private sector. It may also refer to intra-organizational unions such as the science and anthropology departments within a university collaborating on a project.

Wide application refers to a project that targets a large and diverse audience in terms of numbers or demographics; or that can serve as a model program elsewhere.

Section IV. Requirements for Proposals and Matching Funds

K. Contents of Proposal and Scoring

In the order listed here, the proposal must contain the following: (1) *Two* standard federal forms; (2) project summary sheet; (3) project description; (4) detailed budget; (5) timeline; (6) description of personnel; and (7) letters of commitment (if you have partner organizations). Please follow the instructions below and do not submit additional items. EPA must make copies of your proposal for use by grant reviewers. Unnecessary cover letters, attachments, divider sheets, forms or binders create a paperwork burden for

the reviewers and failure to follow instructions may lower your score.

Federal Forms: Application for Federal Assistance (SF-424) and Budget Information (SF-424A): These two forms are required for all federal grants and must be submitted on the front of your proposal. The two forms, *along with instructions specific to this program* and examples, are included at the end of this notice. On our Web site these two forms can also be completed and printed off with your data and dollars included. Only finalists will be asked to submit the other federal forms necessary to process a federal grant.

Work Plan and Appendices: A work plan describes your proposed project and your budget. Appendices establish your timeline, your qualifications, and any partnerships with other organizations. Include all five sections described below in the same order in which each is listed. Correct order ensures that reviewers easily evaluate your proposal without overlooking information. Each section is evaluated and scored by reviewers. The highest possible score per proposal is 100 points as outlined below and in paragraph (N).

(1) *Project Summary:* Provide an overview of your entire project in the following format and on *one page only*:

(a) *Organization:* Describe: (1) Your organization, and (2) list your key partners for this grant, if applicable. Partnerships are encouraged and considered to be a major factor in the success of projects.

(b) *Summary Statement:* Provide an overview of your project that explains the concept and your goals and objectives. This should be a very basic explanation in layman's terms to provide a reviewer with an understanding of the purpose and expected outcome of your educational project. If a person unfamiliar with your project reads this paragraph and they cannot grasp your basic concept, then you have not achieved what is requested here.

(c) *Educational Priority:* Identify which priority listed in Section III you will address, such as education reform. Proposals may address more than one educational priority, however, EPA cautions against losing focus on projects. Evaluation panels often select projects with a clearly defined purpose, rather than projects that attempt to address multiple priorities at the expense of a quality outcome.

(d) *Delivery Method:* Explain how you will reach your audience, such as workshops, conferences, field trips, interactive programs, etc.

(e) *Audience:* Describe the demographics of your target audience

including the number and types you expect to reach, such as teachers and/or students and specific grade levels, health care providers, migrant workers, the general public, etc.

(f) *Costs:* List the types of activities on which you will spend the EPA portion of the grant funds.

The project summary will be scored on how well you provide an overview of your entire project using the format and topics stated above.

Summary-Maximum Score: 10 Points

(2) *Project Description:* Describe precisely what your project will achieve—why, how, when, with what, and who will benefit. Explain each aspect of your proposal in enough detail to answer a grant reviewer's questions. This section is intended to provide you with the flexibility to be creative and does *not* require any specific format for describing your project. However, you should address the following to ensure that grant reviewers can fully comprehend and score your project. Address all criteria in any sequence that best demonstrates the strengths of your project.

This subsection will be scored on how well you design and describe your project and how effectively your project meets the following criteria:

(a) *Why:* Explain the purpose of your project and how it will address an educational priority listed in Section III, such as education reform or community issues. Also identify your environmental issue, such as energy conservation, clean air, ecosystem protection, or cross-cutting topics. Explain the importance to your community, state, or region. Specify if the project has the potential for wide application, and/or can serve as a model for use in other locations with a similar audience.

(b) *Who:* Explain who will conduct the project; identify the target audience and demonstrate an understanding of the needs of that audience. *Important:* explain your recruitment plan to attract your target audience; and clarify any incentives used such as stipends or continuing education credits.

(c) *How:* Explain your strategy, objectives, activities, delivery methods, and outcomes to establish for reviewers that you have realistic goals and objectives and will use effective methods to achieve them. Clarify for the reviewers how you will complete all basic steps from beginning to end. Do not omit steps that lead up to or follow the actual delivery methods, e.g., if you plan to make a presentation about your project at a local or national conference, specify where.

(d) *With What*: Demonstrate that the project uses or produces quality educational products or methods that teach critical-thinking, problem-solving, and decision-making skills. (Please note restrictions on the development of curriculum and educational materials in Section H.)

Description-Maximum Score: 40 Points (10 points for each of (a) through (d))

(3) *Project Evaluation*: Explain how you will ensure that you are meeting the goals, objectives, outputs, and outcomes of your project. Evaluation plans may be quantitative and/or qualitative and may include, for example, evaluation tools, observation, or outside consultation.

Please Note: All applicants under this grant cycle must be willing to comply with forthcoming EPA requirements for using a pre and post training questionnaire to determine the overall effectiveness of this grant program. Additional information about this requirement should be available by the summer of 2004 when grant finalists are selected and awarded.

The project evaluation will be scored on how well your plan will: (a) Measure the project's effectiveness; and (b) apply evaluation data gathered during your project to strengthen it.

Evaluation-Maximum Score: 10 Points (5 Points each for (a) and (b))

(4) *Budget*: Clarify how EPA funds and non-federal matching funds will be used for specific items or activities, such as personnel/salaries, fringe benefits, travel, equipment, supplies, contract costs, and indirect costs. Include a table which lists each major proposed activity, and the amount of EPA funds and/or matching funds that will be spent on each activity. Smaller grants with uncomplicated budgets may have a table that lists only a few activities. PLEASE NOTE the following funding restrictions:

- Indirect costs may be requested *only* if your organization already has an Indirect Cost Rate Agreement in place with a Federal Agency and has it on file, subject to audit.
- Funds for salaries and fringe benefits may be requested *only* for those personnel who are directly involved in implementing the proposed project and whose salaries and fringe benefits are directly related to specific products or outcomes of the proposed project. EPA strongly encourages applicants to request reasonable amounts of funding for salaries and fringe benefits to ensure that your proposal is competitive.
- EPA will *not* fund the acquisition of real property (including buildings) or

the construction or modification of any building.

Matching Funds Requirement: Non-federal matching funds of *at least* 25% of the *total cost* of the project are required, and EPA encourages additional matching funds where possible. The match must be for an allowable cost and may be provided by the applicant or a partner organization or institution. The match may be provided in cash or by in-kind contributions and other non-cash support. In-kind contributions often include salaries or other *verifiable* costs and this value must be carefully documented. In the case of salaries, applicants may use either minimum wage or fair market value. If the match is provided by a partner organization, the applicant is still responsible for proper accountability and documentation. All grants are subject to Federal audit.

Important: The matching non-federal share is a percentage of the *entire cost* of the project. For example, if the 75% federal portion is \$10,000, then the entire project should, at a minimum, have a budget of \$13,333, with the recipient providing a contribution of \$3,333. To assure that your match is sufficient, simply divide the Federally requested amount by three. Your match must be at least one-third of the requested amount to be sufficient. For a \$5,000 EPA grant your match cannot be less than \$1,667.

Other Federal Funds: You may use other Federal funds in addition to those provided by this program, but not for activities that EPA is funding. You may not use any federal funds to meet any part of the required 25% match described above, unless it is specifically authorized by statute. If you have already been awarded federal funds for a project for which you are seeking additional support from this program, you must indicate those funds in the budget section of the work plan. You must also identify the project officer, agency, office, address, phone number, and the amount of the federal funds.

This subsection will be scored on: (a) How well the budget information clearly and accurately shows how funds will be used; (b) whether the funding request is reasonable given the activities proposed; and (c) whether the funding provides a good return on the investment.

Budget-Maximum Score: 15 Points (5 points for each of (a) through (c))

(5) *Appendices*:

(a) *Timeline*—Include a “timeline” to link your activities to a clear project schedule and indicate at what point over the months of your budget period

each action, event, product development, etc. occurs.

(b) *Key Personnel*—Attach a one page resume for the key personnel conducting the project. (Maximum of 3 one page resumes please.)

(c) *Letters of Commitment*—If the applicant organization has partners, such as schools, state agencies, or other organizations, include letters of commitment from partners *explaining their role* in the proposed project. Do *not* include letters of endorsement or recommendation or have them mailed in later; they will *not* be considered in evaluating proposals.

Please do not submit other appendices or attachments such as video tapes or sample curricula. EPA may request such items if your proposal is among the finalists under consideration for funding.

This subsection will be scored based upon: (1) The timeline clarifies the workplan and establishes for reviewers that the project is well thought out and feasible as planned; (2) the qualifications and skills of key personnel to implement the project; and (3) the type of partnership (if any) and the extent to which a firm commitment is made by the partner to provide services, facilities, funding, etc.

Appendices-Maximum Score: 15 Points (5 points each (a) through (c))

(6) *Bonus Points*: Reviewers have the flexibility to provide up to 10 bonus points for exceptional projects based on the following criteria. (a) A maximum of 5 bonus points for: addressing an educational priority or environmental issue well, strong partnerships, solid recruitment plan for teachers or other target audience, creative use of resources, innovation, or other strengths noted by the reviewers. (b) A maximum of 5 bonus points for a well explained and easily read proposal. Factors for points could include: clear and concise, well organized, no unnecessary jargon, and other strengths noted by the reviewers who evaluate and compare proposals.

Bonus Points-Maximum Score: 10 Points (5 points each for (a) and (b))

L. Page Limits

The Work Plan should not exceed 5 pages. “One page” refers to one side of a single-spaced typed page. The pages must be letter sized (8½ × 11 inches), with margins at least one-half inch wide and with normal type size (11 or 12 font), rather than extremely small type. The 5 page limit applies to the narrative portion, *i.e.*, the Summary, Project Description, and Project Evaluation. The

Detailed Budget, Timeline, and Appendices are not included in the page limit.

M. Submission Requirements and Copies

The applicant must submit one original and two copies of the proposal (a signed SF-424, an SF-424A, a work plan, a detailed budget, and the appendices listed above). Do not include other attachments such as cover letters, tables of contents, additional federal forms, divider sheets, or appendices other than those listed above. *Grant reviewers often lower scores on proposals for failure to follow instructions.* Your pages should be sorted as listed in Section IV, with the SF-424 being the first page of your proposal and *signed* by a person authorized to receive funds. Blue ink for signatures is preferred. Proposals must be reproducible; they should not be bound. They should be stapled or clipped once in the upper left hand corner, on white paper, and with page numbers because many proposals get copied at one time. Mailing addresses for submission of proposals are listed in Section IV of this document.

Forms: If you receive this solicitation electronically and if the standard federal forms for Application (SF-424) and Budget (SF-424A) cannot be printed by your equipment, you may locate them the following ways (but please read our instructions which have been modified for this grant program): The **Federal Register** in which this document is published contains the forms and is available to be copied at many public libraries; or you may call or write the appropriate EPA office listed at the end of this document.

Section V. Review and Selection Process

N. Proposal Review

Proposals submitted to EPA headquarters and regional offices will be evaluated using the criteria defined here and in Section IV of this solicitation. Proposals will be reviewed in two phases—the screening phase and the evaluation phase. During the screening phase, proposals will be reviewed to determine if they meet the basic eligibility requirements. Only those proposals satisfying all of the basic requirements will enter the full evaluation phase of the review process. During the evaluation phase, proposals will be evaluated based upon the quality of their work plans. Reviewers conducting the screening and evaluation phases of the review process will include EPA officials and external

environmental educators approved by EPA. At the conclusion of the evaluation phase, the reviewers will score proposals based upon the scoring system described in detail in Section IV. In summary, the maximum score of 100 points can be reached as follows:

- (1) Project Summary—10 Points
- (2) Project Description—40 Points
- (3) Project Evaluation—10 Points
- (4) Budget—15 Points
- (5) Appendices—15 Points
- (6) Bonus Points—10 Points (Only for outstanding proposals)

O. Final Selections

After individual projects are evaluated and scored by reviewers, as described above, EPA officials in the regions and at headquarters will select a diverse range of finalists from the highest ranking proposals. In making the final selections, EPA will take into account the following:

- (1) Effectiveness of collaborative activities and partnerships, as needed to successfully implement the project;
- (2) Environmental and educational importance of the activity or product;
- (3) Effectiveness of the delivery mechanism (*i.e.*, workshop, conference, etc.);
- (4) Cost effectiveness of the proposal; and
- (5) Geographic distribution of projects.

P. Notification to Applicants

Applicants will receive a confirmation that EPA has received their proposal once EPA has received all proposals and entered them into a computerized database, usually within two months of receipt. Usually within six months of application, EPA will contact finalists to request additional federal forms and other information as recommended by reviewers.

Section VI. Grantees Responsibilities

Q. Responsible Officials

The Act requires that projects be performed by the applicant or by a person satisfactory to the applicant and EPA. All proposals must identify any person other than the applicant who will assist in carrying out the project. These individuals are responsible for receiving the grant award agreement from EPA and ensuring that all grant conditions are satisfied. Recipients are responsible for the successful completion of the project.

R. Incurring Costs

Grant recipients may begin incurring allowable costs on the start date identified in the EPA grant award

agreement. Activities must be completed and funds spent within the time frames specified in the award agreement. EPA grant funds may be used only for the purposes set forth in the grant agreement and must conform to Federal cost principles contained in OMB Circular A-87; A-122; and A-21, as appropriate. Ineligible costs will be reduced from the final grant award.

S. Reports and Work Products

Specific financial, technical, and other reporting requirements will be identified in the EPA grant award agreement. Grant recipients must submit formal quarterly or semi-annual progress reports, as instructed in the award agreement. Also, two copies of a final report and two copies of all work products must be sent to the EPA project officer within 90 days after the expiration of the budget period. This submission will be accepted as the final requirement, unless the EPA project officer notifies you that changes must be made.

Section VII. Resource Information and Mailing List

T. Internet: www.epa.gov/enviroed

Please visit our Web site where you can view and download: federal forms, tips for developing successful grant applications, descriptions of projects funded under this program by state, and other education links and resource materials. The “Excellence in EE” series of publications listed there includes guidelines for: developing and evaluating educational materials; the initial preparation of environmental educators; and using environmental education in grades K-12 to support state and local education reform goals.

U. Other Funding

Please note that this is a very competitive grant program. Limited funding is available and many qualified grant applications will not be reached by EPA even though efforts will be made to secure funding from all available sources within the Agency. If your project is not funded, you may wish to review other available grant programs in the *Catalog of Federal Domestic Assistance*, which is available at www.cfda.gov/ and in local libraries.

V. Regulatory References

The Environmental Education Grant Program Regulations, published in the **Federal Register** on March 9, 1992, provide additional information on EPA's administration of this program (57 FR 8390; Title 40 CFR, part 47 or 40 CFR part 47). Also, EPA's general assistance regulations at 40 CFR part 31

apply to state, local, and Indian tribal governments and 40 CFR part 30 applies to all other applicants such as nonprofit organizations.

W. Federal Procedures

(1) Pre-application assistance: None planned.

(2) Dispute Resolution Process: Procedures are in 40 CFR 30.63 and 40 CFR 31.70.

(3) Quality Assurance Project Plans are not required for Environmental Education Grants because environmental data, if any, is not performed by or for EPA or submitted to EPA for use.

(3) Confidential Business Information: Applicants should clearly mark information contained in their proposal which they consider confidential business information. EPA will make final confidentiality decisions as specified in 40 CFR part 2, subpart B. If no such claim accompanies a proposal when it is received by EPA, it may be made available to the public without further notice to the applicant.

X. Mailing List for Environmental Education Grants

EPA annually creates a new mailing list for this grant program, except that all applicants who respond to this Solicitation Notice will automatically be put on the next list, if there is a future grant cycle. A future cycle is contingent upon availability of funding. If you fail to submit a proposal in response to this Solicitation Notice, but wish to be added to the mailing list, please mail your request along with your name, organization, address, and phone number to: Environmental Education Grant Program (Year 2005), EPA Office of Environmental Education (1704 A), 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

Dated: November 5, 2003.

CeCe Kremer,

Deputy Associate Administrator, Office of Public Affairs.

Mailing Addresses and Information

Applicants who need more information about this grant program or clarification about specific requirements in this Solicitation Notice, may contact the Environmental Education Office in Washington, D.C. for grant requests of more than \$25,000 in Federal funds or their EPA regional office for grant requests of \$25,000 or less.

U.S. EPA Headquarters—for Proposals Requesting More Than \$25,000 From EPA

Mail proposals (regular mail) to:
Environmental Education Grant

Program, Office of Environmental Education (1704 A), 1200 Pennsylvania Avenue, NW., Washington, DC 20460

Fed Ex, UPS or Courier to:
Office of Environmental Education (Room 1426 North), 1200 Pennsylvania Avenue, NW., Washington, DC 20004

Information: Diane Berger or Sheri Jojokian (202) 564-0451

U.S. EPA REGIONAL OFFICES—For Proposals Requesting \$25,000 or Less

Mail the proposal to the Regional Office where the project will take place, rather than where the applicant is located, if these locations are different.

EPA Region I—CT, ME, MA, NH, RI, VT

Mail proposals to:

U.S. EPA, Region I, Enviro Education Grants (MGM), 1 Congress Street, suite 1100, Boston, MA 02114

Hand-deliver to:

10th Floor Mail Room, Boston MA (M-F 8 a.m.-4 p.m.)

Information:

Kristen Conroy, (617) 918-1069

EPA Region II—NJ, NY, PR, VI

Mail proposals to:

U.S. EPA, Region II, Enviro Education Grants, Grants and Contracts Management Branch, 290 Broadway, 27th Floor, New York, NY 10007-1866

Information:

Teresa Ippolito, (212) 637-3671

EPA Region III—DC, DE, MD, PA, VA, WV

Mail proposals to:

U.S. EPA, Region III, Enviro Education Grants, Grants Management Section (3PM70), 1650 Arch Street, Philadelphia, PA 19103-2029

Information:

Bonnie Turner-Lomax (215) 814-5542

EPA Region IV—AL, FL, GA, KY, MS, NC, SC, TN

Mail proposals to:

U.S. EPA, Region IV, Enviro Education Grants, Office of Public Affairs, 61 Forsyth Street, SW., Atlanta, GA 30303

Information:

Benjamin Blair, (404) 562-8321

EPA Region V—IL, IN, MI, MN, OH, WI

Mail proposals to:

U.S. EPA, Region V, Enviro Education Grants, Grants Management Section (MC-10J), 77 West Jackson Boulevard, Chicago, IL 60604.

Information:

Megan Gavin (312) 353-5282

Region VI—AR, LA, NM, OK, TX

Mail proposals to:

U.S. EPA Region VI, Enviro Education Grants (6XA), 1445 Ross Avenue, Dallas, TX 75202

Information:

Jo Taylor, (214) 665-2204

Region VII—IA, KS, MO, NE

Mail proposals to:

U.S. EPA, Region VII, Enviro Education Grants, Office of External Programs, 901 N. 5th Street, Kansas City, KS 66101

Information:

Denise Morrison, (913) 551-7402

Region VIII—CO, MT, ND, SD, UT, WY

Mail proposals to:

U.S. EPA, Region VIII, Enviro Education Grants, 999 18th Street (80C), Denver, CO 80202-2466

Information:

Christine Vigil, (303) 312-6605

Region IX—AZ, CA, HI, NV, American Samoa, Guam

Mail proposals to:

U.S. EPA, Region IX, Enviro Education Grants (CGR-3), 75 Hawthorne Street, San Francisco, CA 94105

Information:

Bill Jones, (415) 947-4276

Region X—AK, ID, OR, WA

Mail proposals to:

U.S. EPA, Region X, Enviro Education Grants, Public Environmental Resource Center, 1200 Sixth Avenue (CEC-124), Seattle, WA 98101

Information:

Sally Hanft, (800) 424-4372, (206) 553-1207

Instructions for the SF 424—Application

This is a standard Federal form to be used by applicants as a required face sheet for the Environmental Education Grants Program. These instructions *are modified* for this program only and do *not* apply to any other Federal program.

1. Choose "Non-Construction"—under Application—construction costs are unallowable.

2. Fill in date you forward application to EPA. Leave "Applicant Identifier" blank as it will be a federal ID number filled in by EPA. If you have a state ID number it goes on the line directly below.

3. State use only (if applicable) or leave blank.

4. *New Requirement:* All organizations making application for

federal grant funds as of the current fiscal year must acquire a DUNS Identification Number and enter it into the block entitled "Federal Identifier." You may acquire a DUNS number via telephone or Web site from Dun and Bradstreet. The Web site is <http://www.dnb.com> and the toll free phone number is 1-866-705-5711. This new requirement is from the Office of Management and Budget (OMB) so any questions about this process should be directed to that Federal Agency and not to EPA.

5. Legal name of applicant organization, name of primary organizational unit which will undertake the grant activity, complete address of the applicant organization, and name, telephone, and FAX number of the person to contact on matters related to this application. You do not have to list the "county" as part of the address.

6. Enter Employer Identification Number (EIN) as assigned by the Internal Revenue Service. You can obtain this number from your payroll office. It is the same Federal Identification Number which appears on W-2 forms. If your organization does not have a number, you may obtain one by calling the Taxpayer Services number for the IRS.

7. Enter the appropriate letter in the space provided and if you are a not-for-profit organization you must be categorized as a 501 (c)(3) by IRS to be eligible for this grant program..

8. Check the box marked "new" since all proposals must be for new projects.

9. Enter U.S. Environmental Protection Agency.

10. Enter 66.951 Environmental Education Grants Program

11. Enter a descriptive title of the project—please make it brief and also helpful as a descriptive title to be used in press releases and grant profiles which go onto our Web site.

12. List only the largest areas affected by the project (e.g., State, counties, cities).

13. Please see Section I (C) in Solicitation Notice for specifics on project/budget periods.

14. In (a) list the Congressional District where the applicant organization is located; and in (b) any District(s) affected by the program or project. If your project covers many areas, several congressional districts will be listed. If it covers the entire state, simply put in STATEWIDE. If you are not sure about the congressional

district, call the County Voter Registration Department.

15. Amount requested or to be contributed during the funding/budget period by each contributor. Line (a) is for the amount of money you are requesting from EPA. Lines (b–e) are for the amounts either you or another organization are providing for this project. Line (f) is for any program income which you expect will be generated by this project. Examples of program income are fees for services performed, income generated from the sale of materials produced with the grant funds, or admission fees to a conference financed by the grant funds. The total of lines (b–e) must be at least 25% of line (g), because this grant program has a matching requirement of 25% of the TOTAL ALLOWABLE PROJECT COSTS. Divide line (a) by three to determine the smallest match allowable for your proposal. Value of in-kind contributions should be included on appropriate lines as applicable. For multiple program funding, use totals and show breakdown using same categories as item 15.

16. Check (b) (NO) since this program is exempt from this requirement.

17. This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include delinquent audit disallowances, loans and taxes.

18. The authorized representative is the person who is able to contract or obligate your agency to the terms and conditions of the grant. (Please sign with blue ink.) A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office.

Instructions for the SF-424A—Budget

This is a standard Federal form used by applicants as a basic budget. These instructions are modified for this grant program only and do not apply to any other Federal Program.

Section A—Budget Summary—Do NOT complete—Leave blank for this program.

Section B—Budget Categories—Complete Columns (1), (2) and (5) as stated below.

All funds requested and contributed as a match must be listed under the appropriate Object Class categories listed on this form. Please round figures to the nearest dollar. Include Federal funds in column (1); Non-Federal (matching) funds in column (2); then

add sideways and put the totals in column (5) for all categories. Many applicants will blank lines in some Object Class Categories and no applicant should have an entry on line 6(g) because it is an unallowable cost for this program.

Line 6(i)—Show the totals of lines 6(a) through 6(h) in each column.

Line 6(j)—Show the amount of indirect costs, but ONLY if your organization already has an Indirect Cost Rate Agreement with a Federal Agency and has it on file, subject to audit.

Line 6(k)—Enter the total of amounts of Lines 6(i) and 6(j).

Line 7—Program Income—Enter the estimated amount of income, if any, expected to be generated from this project. Do not add or subtract this amount from the total project amount. Describe the nature and source of income in the detailed budget description and your planned use of the funds.

Detailed Itemization of Costs: The proposal must also contain a detailed budget description as specified in Section IV (K)(4) of this Notice, and should conform to the following:

Personnel: List all participants in the project by position title. Give the percentage of the budget period for which they will be fully employed on the project (e.g., half-time for half the budget period equals 25%, full-time for half the budget period equals 50%, etc.). Give the annual salary and the total cost over the budget period for all personnel listed.

Travel: If travel is budgeted, show destination and purpose of travel as well as costs.

Equipment: Identify all equipment to be purchased and for what purpose it will be used.

Supplies: If the supply budget is less than 2% of total costs, you do not need to itemize.

Contractual: Specify the nature and cost of such services. EPA may require review of contracts for personal services prior to their execution to assure that all costs are reasonable and necessary to the project.

Construction: Not allowable for this program.

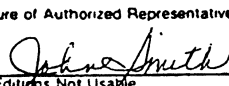
Other: Specify all other costs under this category.

Indirect Costs: Provide an explanation of how indirect charges were calculated for this project.

BILLING CODE 6560-50-P

**APPLICATION FOR
FEDERAL ASSISTANCE**

OMB Approval No. 0348-0043

1. TYPE OF SUBMISSION: Application <input type="checkbox"/> Construction <input type="checkbox"/> Non-Construction <input checked="" type="checkbox"/> Preapplication <input type="checkbox"/> Construction <input type="checkbox"/> Non-Construction <input type="checkbox"/>		2. DATE SUBMITTED January 6, 2004	Applicant Identifier
		3. DATE RECEIVED BY STATE	State Application Identifier
		4. DATE RECEIVED BY FEDERAL AGENCY	Federal Identifier DUNS # See instructions on how to acquire this number
5. APPLICANT INFORMATION			
Legal Name: Wythe County School System		Organizational Unit: Office of Teacher Training	
Address (give city, county, state, and zip code): 219 Main Street Wytheville, VA 12345		Name and telephone number of the person to be contacted on matters involving this application (give area code): Janet Jones (TEL) (540) 223-4567 (FAX) (540) 223-7890	
6. EMPLOYER IDENTIFICATION NUMBER (EIN): 1 2 - 3 4 5 6 7 8 9		7. TYPE OF APPLICANT: (enter appropriate letter in box) <input checked="" type="checkbox"/> B A. State H. Independent School Dist. B. County I. State Controlled Institution of Higher Learning C. Municipal J. Private University D. Township K. Indian Tribe E. Interstate L. Individual F. Intermunicipal M. Profit Organization G. Special District N. Non-Profit O. Other (Specify)	
8. TYPE OF APPLICATION: <input checked="" type="checkbox"/> New <input type="checkbox"/> Continuation <input type="checkbox"/> Revision If Revision, enter appropriate letter(s) in box(es): <input type="checkbox"/> A. Increase Award <input type="checkbox"/> B. Decrease Award <input type="checkbox"/> C. Increase Duration <input type="checkbox"/> D. Decrease Duration Other (specify):		9. NAME OF FEDERAL AGENCY: U.S. ENVIRONMENTAL PROTECTION AGENCY	
10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER: 6 6 9 5 1 TITLE: ENVIRONMENTAL EDUCATION GRANT		11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT: "Eco-Blue" Teacher Training re: Ecosystems in the Blue Ridge Mountains	
12. AREAS AFFECTED BY PROJECT (cities, counties, states, etc.): 3 Counties: Wythe, Smith, Green			
13. PROPOSED PROJECT: Start Date: 7/1/04 Ending Date: 6/30/05		14. CONGRESSIONAL DISTRICTS OF: a. Applicant: 02 b. Project: 02, 04, 12	
15. ESTIMATED FUNDING:		16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?	
a. Federal	\$ 10,000 .00	a. YES. THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON:	
b. Applicant	\$ 3,000 .00	DATE:	
c. State	\$.00	b. NO. <input checked="" type="checkbox"/> PROGRAM IS NOT COVERED BY E.O. 12372	
d. Local	\$.00	<input type="checkbox"/> OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW	
e. Other	\$ 334 .00		
f. Program Income	\$.00	17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT?	
g. TOTAL	\$ 13,334 .00	<input type="checkbox"/> Yes If "Yes," attach an explanation. <input type="checkbox"/> No	
18. TO THE BEST OF MY KNOWLEDGE AND BELIEF, ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT, THE DOCUMENT HAS BEEN DULY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED			
a. Typed Name of Authorized Representative John Smith		b. Title Superintendent of Schools	c. Telephone number (540) 223-4231
d. Signature of Authorized Representative 		e. Date Signed January 6, 2004	

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EXAMPLE

SECTION B -- BUDGET CATEGORIES

6. Object Class Categories	GRANT PROGRAM, FUNCTION OR ACTIVITY			Total (6)
	(1) Federal Funds	(2) Non-Federal Match		
a. Personnel	\$ 4,200	\$ 1,600		\$ 5,800
b. Fringe Benefits	400	200		600
c. Travel	500	200		700
d. Equipment				
e. Supplies	2,300	1,000		3,300
f. Contractual	1,200			1,200
g. Construction	XXXXXXXXXXXX	XXXXXXXXXXXX		XXXXXXXXXXXX
h. Other	1,400	334		1,734
i. Total Direct Charges (sum of 6a - 6h)	10,000	3,334		13,334
j. Indirect Charges				
k. TOTALS (sum of 6i and 6j)	\$ 10,000	\$ 3,334		\$ 13,334
7. Program Income	\$	\$		\$

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Standard Form 424A (4-88)
Prescribed by OMB Circular A-102

APPLICATION FOR
FEDERAL ASSISTANCE

OMB Approval No. 0348-0043

1. TYPE OF SUBMISSION: Application <input type="checkbox"/> Construction <input checked="" type="checkbox"/> Non-Construction Preapplication <input type="checkbox"/> Construction <input type="checkbox"/> Non-Construction		2. DATE SUBMITTED	Applicant Identifier
3. DATE RECEIVED BY STATE		State Application Identifier	
4. DATE RECEIVED BY FEDERAL AGENCY		Federal Identifier DUNS #	
5. APPLICANT INFORMATION			
Legal Name:		Organizational Unit:	
Address (give city, county, State, and zip code):		Name and telephone number of person to be contacted on matters involving this application (give area code) Name (Tel) (Fax)	
6. EMPLOYER IDENTIFICATION NUMBER (EIN): <div style="border: 1px solid black; padding: 2px; display: inline-block;"> [] [] - [] [] [] [] [] [] </div>		7. TYPE OF APPLICANT: (enter appropriate letter in box) <div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> A. State B. County C. Municipal D. Township E. Interstate F. Intermunicipal G. Special District </div> <div style="width: 45%;"> H. Independent School Dist. I. State Controlled Institution of Higher Learning J. Private University K. Indian Tribe L. Individual M. Profit Organization N. Non-Profit O. Other (Specify) _____ </div> </div>	
8. TYPE OF APPLICATION: <input checked="" type="checkbox"/> New <input type="checkbox"/> Continuation <input type="checkbox"/> Revision If Revision, enter appropriate letter(s) in box(es) [] [] A. Increase Award B. Decrease Award C. Increase Duration D. Decrease Duration Other(specify): _____		9. NAME OF FEDERAL AGENCY: U.S. Environmental Protection Agency	
10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER: ENVIRONMENTAL EDUCATION GRANT <div style="border: 1px solid black; padding: 2px; display: inline-block;"> [6] [6] - [9] [5] [1] </div>		11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:	
12. AREAS AFFECTED BY PROJECT (Cities, Counties, States, etc.):			
13. PROPOSED PROJECT		14. CONGRESSIONAL DISTRICTS OF:	
Start Date	Ending Date	a. Applicant	b. Project
15. ESTIMATED FUNDING:		16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?	
a. Federal	\$.00	a. YES. THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON: DATE _____	
b. Applicant	\$.00	b. No. <input checked="" type="checkbox"/> PROGRAM IS NOT COVERED BY E. O. 12372 <input type="checkbox"/> OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW	
c. State	\$.00	17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT? <input type="checkbox"/> Yes If "Yes," attach an explanation. <input type="checkbox"/> No	
d. Local	\$.00		
e. Other	\$.00		
f. Program Income	\$.00		
g. TOTAL	\$.00		
18. TO THE BEST OF MY KNOWLEDGE AND BELIEF, ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT, THE DOCUMENT HAS BEEN DULY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED.			
a. Type Name of Authorized Representative		b. Title	c. Telephone Number
d. Signature of Authorized Representative		e. Date Signed	

BUDGET INFORMATION - Non-Construction Programs

OMB Approval No.: 0348-0044

SECTION A - BUDGET SUMMARY

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SECTION B - BUDGET CATEGORIES

6. Object Class Categories	GRANT PROGRAM, FUNCTION OR ACTIVITY		Total (5)
	(1)	(2)	
a. Personnel	\$	\$	\$
b. Fringe Benefits			
c. Travel			
d. Equipment			
e. Supplies			
f. Contractual			
g. Construction	XXXXXXXXXX	XXXXXXXXXX	XXXXXXXXXX
h. Other			
i. Total Direct Charge (sum of 6a-6h)		.00	.00
j. Indirect Charges			
k. TOTALS (sum of 6i and 6j)	\$.00 \$.00 \$
7. Program Income	\$	\$	\$

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Prescribed by OMB Circular A-102

Reader Aids

Federal Register

Vol. 68, No. 218

Wednesday, November 12, 2003

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Federal Register/Code of Federal Regulations

General Information, indexes and other finding aids **202-741-6000****Laws** **741-6000**

Presidential Documents

Executive orders and proclamations **741-6000****The United States Government Manual** **741-6000**

Other Services

Electronic and on-line services (voice) **741-6020**Privacy Act Compilation **741-6064**Public Laws Update Service (numbers, dates, etc.) **741-6043**TTY for the deaf-and-hard-of-hearing **741-6086**

ELECTRONIC RESEARCH

World Wide Web

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